DOCUMENT RESUME

ED 354 688 EC 301 871

AUTHOR	Latham, Peter S.; Latham, Patricia H.
TITLE	Attention Deficit Disorder and the Law. A Guide for Advocates.
PUB DATE	92
NOTE	127p.
AVAILABLE FROM	JKL Communications, 1016 16th St., N.W., Suite 700, Washington, DC 20036 ($25; quantity discount available).
PUB TYPE	Guides - Non-Classroom Use (055)
EDRS PRICE	MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	*Attention Deficit Disorders; Child Advocacy; *Civil Rights; *Court Litigation; Court Role; Due Process; Elementary Secondary Education; Equal Protection; *Federal Legislation; Hyperactivity; *Legal Responsibility; Military Service; School Law; State Legislation; *Student Rights

ABSTRACT

This guide provides a survey of those laws that directly affect the child with attention deficit disorder (ADD), with or without hyperactivity. The guide addresses three general classes of rights: (1) civil rights (for example, the right to equal treatment and opportunity under the law); (2) the right to society's support in educational services and disability payments; and (3) the right to exemption from military service. The guide is divided into 14 parts, of which the first 3 are an introduction, an outline of the judicial system, and an explanation of equal protection and due process guaranteed by the U.S. Constitution. Subsequent parts address the major federal laws which define the rights of individuals with ADD, including: the Rehabilitation Act of 1973; the Individuals with Disabilities Education Act; the Americans with Disabilities Act; the Social Security Act; and the Selective Service Act. Other sections deal with individualized inquiry, state law remedies, court litigation, and parent advocacy. A final section on resources lists approximately 20 textbooks, policy documents, and organizations. (JDD)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED354688

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
This document has been reproduced as received from the person or organization originating it.
Minor changes have been made to improve reproduction quality.
Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

ATTENTION DEFICIT DISORDER AND THE LAW

A GUIDE FOR ADVOCATES

Peter S. Latham, J.D.
and
Patricia H. Latham, J.D.

JKL Communications

Washington, D.C.

EC 301871

BEST COPY AVAILABLE

"PERMISSION TO REPRODUCE THIS MATERIAL IN **OTHER THAN PAPER COPY** HAS BEEN GRANTED BY
Patricia H. Latham
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

ACKNOWLEDGEMENTS

In the preparation of this manuscript, we have been assisted by the opinions of many people. Our special thanks go to:

Paul Jaffe,
Editor, ADDendum
Scarborough, New York

Joseph F. Smith, Jr.,
Professor of Law
Shepard Broad Law Center,
Nova University, Florida

Patricia Quinn, M.D.
Washington, D.C.

Mary Ann Liebert,
President
Mary Ann Liebert, Inc.,
New York, New York

We are indebted to them for their kindness. However, while each of these persons contributed to the preparation of this manuscript, the opinions expressed in it are solely our own.

Publisher: JKL Communications, Washington, D.C.

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, the services of a competent professional should be sought. FROM A DECLARATION OF PRINCIPLES JOINTLY ADOPTED BY A COMMITTEE OF THE AMERICAN BAR ASSOCIATION AND A COMMITTEE OF PUBLISHERS.

Copyright 1992 © Peter S. Latham; Patricia H. Latham

All rights reserved.

Printed in the United States of America

ABOUT THE AUTHORS

This guide has been prepared by Peter S. Latham, and Patricia H. Latham, partners in the Washington, D. C. law firm of LATHAM & LATHAM.

The Lathams have practiced law for over twenty-five years. Both are members of the D.C. Bar and are admitted to various Federal Courts, including D.C. and Maryland. Mr. Latham is admitted to the Federal Circuit. Mrs. Latham is a member of the Virginia Bar and is admitted to the U.S. Supreme Court. They are members of the Panel of Arbitrators and the Panel of Mediators of the American Arbitration Association. They are founders and Trustees of Beacon College, located in Florida, the only four year college for students with learning disabilities. They have been active in learning disability and attention deficit disorder associations.

Peter S. Latham is a graduate of Swarthmore College, B.A. and the University of Pennsylvania Law School, J.D. He is the author of Government Contract Disputes, published by Federal Publications, Inc. as well as legal manuals and numerous articles covering legal and policy issues in national magazines, legal journals, and newspapers. He has been a lecturer at the University of Virginia and served as a Naval Officer in Vietnam (1968-1969) for which he was awarded the Navy Achievement Medal (with combat "V").

Patricia Horan Latham is a graduate of Swarthmore College, B.A. and the University of Chicago Law School, J.D. She is a lecturer at Catholic University Law School and has been a speaker at conferences on legal, business and financial planning. She previously served with the United States Securities and Exchange Commission, was a Director of IB Realty Corporation, played a major role in organizing a national bank to serve the needs of Native Americans and was counsel to an international, diversified holding company with interests in the banking, real estate, and insurance areas.

LATHAM & LATHAM practices in the areas of litigation, corporations, business planning, government contracts, arbitrations, financial and estate planning, employment discrimination and disabilities. It is located at 1016 Sixteenth Street, N.W., Seventh Floor, Washington D.C. 20036.

DEDICATION

For ADD individuals and those who believe in them.

FOREWORD

Attention deficit disorder with or without hyperactivity (ADD) is a disorder which may require advocacy for legal rights. ADD as used in this guide includes Attention Deficit Hyperactivity Disorder (ADHD) and previously has been known as hyperactivity and minimal brain dysfunction. ADD is a neurologically based disorder in which children find it difficult to sit still and pursue attentional tasks for any length of time. It is characterized by inattention, impulsivity, and hyperactivity which can cause the children to have difficulty in the classroom, in social situations and at home. ADD is often mislabeled, misdiagnosed and misunderstood by teachers, parents, neighbors, and peers. When it is, frustration and failure for the child and his family are the inevitable result. ADD affects males more than females, and for this reason the term "he" is used throughout and is intended to refer to both males and females.

The child with ADD may need help in responding to the challenges in his environment. For this reason, it is particularly important that the parent act as advocate for the child and seek to train the child to advocate for himself. The purpose of this guide is to provide a survey of those laws which directly affect the ADD individual as such.

This guide addresses three general classes of rights. These are 1] civil rights - e.g. the right to equal treatment and opportunity under the law 2] the right to society's support in educational services and disability payments and 3] the right to exemption from military service. The guide is divided into 14 parts which address the major Federal laws which define these rights. The laws of each State will, in many instances, complement these Federal laws. The approach is general and non-technical in nature, however, and should not be considered to be a substitute for legal advice concerning particular situations.

The guide may be used to assist your legal counsel, educational consultant or other professionals.

TABLE OF CONTENTS

CHAPTER	PAGE
ABOUT THE AUTHORS	1
FOREWORD	3
1. INTRODUCTION: WHAT IS ADD?	9
A. SYMPTOMS	9
B. CAUSES	16
C. SPECIAL NEEDS	16
D. SUMMARY	18
2. THE JUDICIAL SYSTEM	20
A. IN GENERAL	20
B. STATE COURTS	20
C. FEDERAL COURTS	21
D. ADMINISTRATIVE LITIGATION	22
E. SOURCES OF LAW	23
F. SUMMARY	24
3. THE CONSTITUTION	25
A. EQUAL PROTECTION	26
1. Basic Requirements	26
2. Standard of Review	28
3. Suspect Classifications	28
4. Fundamental Rights	29
5. Rational Basis	29
6. Conclusion	29
B. DUE PROCESS	30
1. Substantive Due Process	30
2. Procedural Due Process	30

3. Conclusion 31

C. SUMMARY 31

4. THE REHABILITATION ACT OF 1973 32

A. BACKGROUND 32

B. COVERAGE 33

C. THE FEDERAL GOVERNMENT 35

D. GOVERNMENT CONTRACTORS 35

E. GRANT AND AID RECIPIENTS 36

F. FAIR HOUSING 37

G. ENFORCEMENT 37

H. SUMMARY 37

5. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 38

A. COVERAGE 38

1. Background 38

2. Statutory Language 39

3. "Other" Health Impairment 40

4. "Specific Learning Disability " 41

5. "Minimal Brain Dysfunction" 42

6. "Seriously Emotionally Disturbed" 44

7. The Derry School District Case 45

B. EVALUATION 47

C. FREE APPROPRIATE PUBLIC EDUCATION 49

1. The IEP 49

2. Mainstreaming 53

3. Private School 53

4. Procedural Protections 53

a. In General 53

b. Pre Hearing Procedures 54

c. Administrative Hearing 54

d. Court 54

D. SPECIAL EDUCATION AND RELATED SERVICES 55

E. PLACEMENT 56

F. COST OF SERVICES 56

G. COLLEGE 57

H. ENFORCEMENT 59

I. SUMMARY 59

6. THE AMERICANS WITH DISABILITIES ACT 61

A. BACKGROUND 61

B. BASIC CONCEPTS 61

1. Definition of Disability 61

2. Qualified Individual 65

C. EMPLOYMENT 66

D. STATE AND LOCAL GOVERNMENTS 69

E. PUBLIC ACCOMMODATIONS 69

1. Insurance 72

2. Education and Licensing 74

F. ENFORCEMENT 76

G. CONCLUSION 76

7. INDIVIDUALIZED INQUIRY 77

A. THE PROBLEM 77

B. NATURE OF THE CRITERION 78

C. INDIVIDUALIZED INQUIRY 79

D. REASONABLE ACCOMMODATION 82

E. SUMMARY 82

8. STATE LAW REMEDIES 84

9. THE SOCIAL SECURITY ACT 85

10. THE SELECTIVE SERVICE ACT 88

A. THE SELECTIVE SERVICE ACT AND REGULATIONS 88

B. ARMY REGULATION (AR) ¶ 40-501 89

1. Medical Acceptability 89

2. Behavior Disorders 89

3. Academic Skills Disorders 90

4. Psychiatric Examination 90

5. Neurological Impairments 91

6. Impact on Military Duties 91

C. PROCEDURE 92

D. SUMMARY 93

11. ADD IN COURT 94

A. FAMILY LAW 94

1. Parental Duties 95

2. Child Support 95

3. Custody 96

a. Divorce 96

b. Neglect 97

B. HEALTH AND WELFARE 98

C. WORKMEN'S COMPENSATION 98

D. CRIMINAL LAW 98

1. Culpability 99

2. Sentencing 100

3. Procedure 101

a. Pre-Trial Interrogation 101

b. Capacity To Stand Trial 102

c. Capacity To Testify 102

d. Credibility 102

e. Appeal 103

f. Juvenile Offenses 103

E. CIVIL LITIGATION 104

F. EDUCATION AND EMPLOYMENT 104

G. SUMMARY 105

12. PARENT ADVOCACY 106

13. SUMMARY 109

A. BASIC RULES 109

B. CONSTITUTIONAL LAW 109

C. DISCRIMINATION 109

1. Definition 109

2. Limitations 113

D. SERVICES, SUPPORT AND ASSISTANCE 114

E. GENERAL LEGAL PRINCIPLES 115

F. CONCLUSION 117

14. RESOURCES 118

1 Introduction: What is ADD?

A. SYMPTOMS

Just what is ADD and why is it important? Curiously, one of the most compelling discussions of ADD and the needs of those having it, was issued by the Department of Justice rather than those agencies and educational professionals more obviously interested in the field. On 16 December 1988, the Administrator of the Drug Enforcement Administration of the Department of Justice issued a final ruling on the proper 1986 production quota of Ritalin following a hearing held for that purpose. Among other things, the Administrator made the following findings:

> 5. ADD (officially named attention deficit disorder with hyperactivity (ADD/H) and sometimes simply called 'hyperactivity') is a developmental disorder in which children find it difficult to sit still and pursue attentional tasks for any length of time. ADD, which affects boys more than girls, is characterized in schools by frequent out-of-the-seat behavior in the classroom which is obviously disruptive for the other students. ADD children commonly are unable to complete academic assignments, have attention problems in the classroom, and often are unable to write legibly. Many such children physically provoke others nearby and most lack appropriate social skills. ADD children are also frequently unmanageable at home, which can easily aggravate or create a variety of domestic problems.
>
> 6. ADD in children, while not necessarily a life-threatening disorder, is a very disturbing handicap which, if untreated, will affect the child for his entire life.

7. There are currently a number of major treatment methods for childhood ADD, of which methylphenidate medication has become the overwhelmingly most utilized approach. The others include the Feingold dietary treatment, Cylert (registered) (pemoline) medication, Dexedrine (registered) (dextroamphetamine) medication, and behavior modification/ cognitive therapy. None of these other treatment methods is as widely accepted as methylphenidate.

8. The use of methylphenidate in treating ADD in children usually brings about a rapid diminution of the child's difficulties. The children who derive benefit from methylphenidate have improved ability to sit and pay attention in class, they complete work, their grades go up, handwriting improves, visual motor coordination is better, and short-term memory is increased. In addition, the teacher-student relationship improves as does the relationship between parent and child.

9. While the prevalence of ADD has been fairly constant, the frequency of diagnosis and the use of medication to treat the disorder have increased dramatically as physicians, school nurses, and teachers have become increasingly sensitized to it. The percentage of children and adolescents diagnosed as suffering from ADD is approximately 5 to 6%, and the percentage of children in the United States receiving medication for hyperactivity has risen to approximately 2 to 4%. The most reliable estimates indicate that approximately 600,000 children and adolescents nationwide are currently being treated with methylphenidate for ADD.

[DEA Docket No. 86-52; 53 Fed. Reg. 50591 (1988)] ¶¶ 5-9

The disorder is defined by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders (3rd. Ed. Rev.) which is commonly referred to as the DSM-III-R. The symptoms of ADHD are:

A. A disturbance of at least six months during which at least eight of the following are present:

(1) often fidgets with hands or feet or squirms in seat (in adolescents, may be limited to subjective feelings of restlessness)

(2) has difficulty remaining seated when required to do so

(3) is easily distracted by extraneous stimuli

(4) has difficulty awaiting turn in games or group situations

(5) often blurts out answers to questions before they have been completed

(6) has difficulty following through on instructions from others (not due to oppositional behavior or failure of comprehension), e.g., fails to finish chores

(7) has difficulty sustaining attention in tasks or play activities

(8) often shifts from one uncompleted activity to another

(9) has difficulty playing quietly

(10) often talks excessively

(11) often interrupts or intrudes on others, e.g., butts into other children's games

(12) often does not seem to listen to what is being said to him or her

(13) often loses things necessary for tasks or activities at school or at home (e.g., toys, pencils, books, assignments)

(14) often engages in physically dangerous activities without considering possible consequences (not for the purpose of thrill-seeking), e.g., runs into street without looking

Note: The above items are listed in descending order of discriminating power based on data from a national field trial of the DSM-III-R criteria for Disruptive Behavior Disorders.

B. Onset before age of seven.

C. Does not meet the criteria for a Pervasive Developmental Disorder.

Criteria for severity of Attention-deficit Hyperactivity Disorder:

Mild: Few, if any, symptoms in excess of those required to make the diagnosis **and** only minimal or no impairment in school and social functioning.

Moderate: Symptoms or functional impairment intermediate between 'mild' and 'severe'.

> **Severe:** Many symptoms in excess of those required to make the diagnosis **and** significant and pervasive impairment in functioning at home and school and with peers.
>
> DSM-III-R ¶ 314.01. See also DSM-III-R ¶ 314.00

To put the matter in a nutshell, "attention deficit disorder' is a developmental disorder of childhood which (a) is manifested by developmentally inappropriate, and medically documented degrees of inattention, impulsiveness, and hyperactivity (b) is physiological rather than emotional in origin (c) is not the result of mental illness and (d) is not the result of environmental, cultural, or economic disadvantage.

The legal and technical definitions which have been covered are of key importance in asserting the rights of the ADD individual. However, the more practical and descriptive discussions of the disorder are most important in promoting understanding and sensitivity to the ADD individual and in facilitating the accommodation of the disorder.

In practical terms, ADD often involves inattention, underfocusing in terms of initiating focus and maintaining focus, impulsivity, overreaction to events, difficulty in organizing and prioritizing, inability to sustain an effort and complete tasks, and low stress tolerance. It may also involve hyperactivity, short temper, mood swings, difficulty in following rules that are not obviously based upon moral principles, difficulty in forming judgments that take into account and give appropriate weight to multiple factors. Perhaps a key deficit with a pervasive influence is the inability to direct, maintain and change focus at will. This leads to attention being drawn to that which is stimulating rather than directed to that which is appropriate.

What all of this means as to behavior on a day to day basis in school and at home requires further explanation.

In early childhood we may see a child who cannot do what we expect with a toy, cannot leave a birthday party or amusement park without an uproar, cannot begin an activity when it is time to do so or shift to another activity upon demand, cannot

get along with the other children, cannot follow the rules at home or in school and ,of course, cannot understand why everyone is always correcting him and acting annoyed.

Later in childhood, we may see difficulty with the following: understanding and doing what is expected, completing tasks, doing papers and projects of any significant length, doing mathematics, complying with rules and practices, playing team sports and getting along with parents, siblings, teachers, other students and people in the community.

As he moves into the teen years the hyperactivity as displayed in childhood diminishes, but at the same time his difficulties may become greater and more distressing to him. He may have low self esteem, feel and act angry and alienated, dislike school more than ever and have difficulty especially with subjects he does not enjoy, break rules and perhaps even some laws, eg. drinking underage and speeding. He is running into problems with a greater number of people in a broader arena. He may be impressionable and easily influenced by peers but certainly not by parents or teachers. He may experiment with and even abuse alcohol and minor drugs. Again, he is drawn to activities and peers that are more stimulating. This is more likely to be the heavy metal concert than the church picnic. In short he may be "superteen." He may be oppositional not only in his actions but also in his intellectual positions. He may adopt outrageous positions and argue relentlessly their merit. His use of logic on these occasions may surprise and confound parents and teachers.

As the ADD teen moves into young adulthood, there is often some improvement. However, up to one half of all ADD children continue to be ADD in adulthood. At the same time demands and expectations are rising. There is the matter of college or employment.

For those who can attend well enough to do the substantive work in college, there often still are the problems of consistency, dealing with long papers, meeting expectations that are less spelled out and more subtle, and the social difficulties.

Likewise in the working world, there are problems with consistency, meeting expectations and handling the social aspects. He may have variable performance in college and may drop in and out. As to employment, he may hold jobs for a shorter period of time than his peers but he will usually find jobs and thus generally be employed. He can "focus" to an extraordinary degree and for a considerable length of time on an activity to which he is drawn. It is important to remember that he is drawn rather than that he is choosing.

He may still break rules, abuse alcohol on occasion, resist limit setting and sometimes appear "antisocial" in his behavior. He is often quite obvious about all of this. Thus, the struggle continues. It is important to note that he is not an "antisocial personality" and he does not suffer from "antisocial personality disorder" within the meaning of DSM-III-R. He is not cruel or vicious, does not initiate fights but rather can be easily provoked, and does not trick or manipulate for its own sake. He is probably not at any significantly greater risk for addiction, the commission of a crime involving moral turpitude or the development of a major mental illness. He may be impulsive and intense in his relationships, be inclined to marry without sufficient consideration of the matter and have difficulties in his marriage.

On the positive side, he may be colorful, exciting, creative, innovative, loyal, kind and ambitious in his own way. Despite his social difficulties in group situations, he may network well with a wide range of people on a one on one basis. If he can find his own unique niche he may do extremely well. It is more likely to involve sales, the media or owning his own business than traditional office work in a large organization. It may involve highly structured positions such as those in the military, the fire department and law enforcement.

To be his effective advocate, you must first understand him and believe in him. Seek to avoid being angry and accusatory. As you believe in him, he eventually may come to believe in himself. He needs to do this in order to take on the task of dealing with the misunderstanding, anger and accusations of others. Then he can become an effective advocate for himself.

While there is no "cure" for ADD, there are approaches which have proved helpful to a great many ADD individuals. The most significant in our experience have

been the creation of an expertise in sports, academics, or work in which the ADD individual can take pride, and the presence of a supportive and structured family existence. Expertise often provides a sense of self-worth where it is often lacking. The family (whether the ADD individual is a child or spouse) contributes to a sense of structure and personal competence. The values of structure, work and family are important for us all, but they frequently mean the difference between success and failure for the ADD individual.

B. CAUSES

The cause of ADD is unknown. However current research being conducted by the National Institutes of Mental Health suggests that the disorder is physiological in origin. The study, conducted by Dr. Alan Zametkin, measured the brain activity of hyperactive adults in some 60 areas, utilizing positron emission topography (PET) scans which measure glucose metabolism, and found that they were significantly less active in the premotor cortex and the superior prefrontal cortex than the controls. The New England Journal of Medicine for 15 November 1990 . The study is ongoing, but when completed, should demonstrate that the immediate cause of attention deficit disorder lies in the inability of several brain areas to function adequately which in turn prevents the brain from processing glucose at sufficient rates. This inability is quite literally a dysfunction, and one which is minimal when compared to most brain damage and defects.

C. SPECIAL NEEDS

In 1987, Congress commissioned a study of learning disabilities. The Report, entitled LEARNING DISABILITIES: A REPORT TO THE U.S. CONGRESS Interagency Committee on Learning Disabilities (1987) noted that ADD children have needs which are unique to them.

> What is clear, however, is that many ADD children have significant academic achievement problems apart from what may be termed 'learning disability.' They perform below expectations in reading and arithmetic, fall significantly behind in academic subjects, and fall behind in more academic sub-

> jects than do controls. One recent study found that ADD children are seven times more likely to experience 'very much difficulty in all academic areas" (Holobrow and Berry, 1986).
>
> LEARNING DISABILITIES: A REPORT TO THE U.S. CONGRESS Interagency Committee on Learning Disabilities (1987) at 205.

Therefore, the need for services for ADD children is well established. Equally certain is the fact that attention deficit disorder sometimes overlaps to some extent with other learning disabilities.

The services in question are unique but not particularly burdensome. First, and most important, it is critical that teachers be educated in the characteristics of the disorder, so that ADD behavior can be identified and distinguished from the normal misbehaviors which are addressed by the discipline system. Second, the ADD children should be educated about the disorder when diagnosed, and appropriate coping strategies should be taught. Third, learning should be stimulated through the predominant use of movies, tapes and other high stimulation materials. Fourth, instruction should occur on a schedule with a substantial number of short breaks to allow the ADD children to "regroup". Further, behavior modification techniques should be preferred over the traditional (and often unsuccessful) disciplinary methods used on non-ADD students. Finally, the the severity of ADD impairment should not be measured by either the slowness of the learning process, as in the case of traditional learning disabilities, or the exhaustion of the child's strength, vitality and alertness, as in the case of other health impairments. It should be measured by the impact on the child's ability to learn and on his ability to be retained in the school system if no remedial action is taken.

The Department of Education has addressed the accommodations which will probably be sufficient for the majority of ADD children:

> Examples of adaptations in regular education programs could include the following:

> providing a structured learning environment; repeating and simplifying instructions about in-class and homework assignments; supplementing verbal instructions with visual instructions; using behavioral management techniques; adjusting class schedules; modifying test delivery; using tape recorders, computer- aided instruction, and other audio-visual equipment; selecting modified textbooks or workbooks; and tailoring homework assignments.
>
> Other provisions range from consultation to special resources and may include reducing class size; use of one-on-one tutorials; classroom aides and note takers; involvement of a 'services coordinator' to oversee implementation of special programs and services, and possible modification of nonacademic times such as lunchroom, recess, and physical education.
>
> (Memorandum, Office of Special Projects and Rehabilitative Services, Department of Education,16 September 1991, p.7)

But the predominant need of ADD individuals is to be supported by his or her family, and to receive fair play from teachers, employers, neighbors, and peers. No one can ensure that either will take place. But this guide and the laws it describes, can be most helpful in the process of advocating.

D. SUMMARY

Attention deficit disorder or ADD is a neurologically based disorder, in which children find it difficult to sit still and pursue attentional tasks for a socially appropriate length of time. It is characterized by inattention, impulsivity, and hyperactivity which can cause children to be unmanageable in the classroom, in social situations, and in the home. Untreated, ADD can result in a life-long pattern of failure and rejection. ADD affects approximately 6 % of the children in the United States.

ADD is often mislabeled, misdiagnosed, and misunderstood. Science is beginning to provide some answers. Research is isolating the cause of ADD. Medication and other treatments are proving helpful. While ADD cannot be "cured" and no single approach to management has proved undisputably successful, it is clear that extensive family support, a willingness of the parents to advocate for the child when he is a minor, and to teach the child to advocate for himself as an adult, are indispensable elements in those successes which have been achieved.

2 The Judicial System

This is a book about legal rights and advocacy. Accordingly, it is important to cover some basics about the American legal system. The following discussion has been made extremely general in nature in order to reduce the topic to proportions consistent with the scope of this book.

A. IN GENERAL

The American judicial system includes two types of Courts, State Courts and Federal Courts. Each operates independently of the other in areas assigned it by the United States Constitution and the constitutions of the states. The task of interpreting the United States Constitution is ultimately performed by the United States Supreme Court.

B. STATE COURTS

Most states have three types of courts: [1 trial courts [2] appellate courts and [3] a single state supreme court. State courts have all of the powers which are generally given to courts. These powers include those traditionally possessed by the Courts of England before the American Revolution as well as those expressly conferred by state constitutions, and statutes. Because they are thought to have the broadest powers, State Courts are called courts of **general** jurisdiction. Most disputes are determined by State Courts.

State courts generally have the authority to [1] award monetary damages [2] decide whether laws have been violated and [3] issue orders requiring that governmental officials (and others) take (or refrain from taking) illegal actions These orders are called injunctions or restraining orders, and they are backed by the Courts' contempt powers. While the courts have many powers that we have not discussed, these are the most important for our purposes.

Trial courts generally decide cases by [1] receiving relevant evidence [2] determining what happened factually on the basis of that evidence and [3] applying rules of law to the pertinent facts. Generally speaking, the trial court is the only type of court which is authorized to receive evidence and make findings of fact. The power to receive evidence and make findings of fact is called **original** jurisdiction. Generally, each state has a number of trial courts, each of which serves its own district.

Cases may be tried before a Judge, and in appropriate cases, a Judge and jury. Generally, jury trials are allowed in criminal cases and in the type of civil case where they were permitted under English law before 1776. Most actions of the type which we will be considering, are tried to a Judge.

Appellate courts make sure that trial courts [1] have sufficient evidence to support the facts that they find and [2] apply the law correctly. They do not receive evidence. Generally each state has several appellate courts, each of which supervises several trial courts.

State Supreme Courts supervise the judicial systems of which they are the head. Generally, they represent the final word on state law. However, the State Courts sometimes decide questions which arise under Federal law, as for example, when a State Court litigant alleges that his or her rights under Federal statutory or constitutional law have been violated. In such a case, it is sometimes possible to appeal from a State Supreme Court to the United States Supreme Court.

C. FEDERAL COURTS

The Federal system was created by Article III of the United States Constitution which provides in Section 1 that: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Congress has followed the state practice. There are three types of Federal courts: [1 trial courts [2] appellate courts and [3] the United States Supreme Court. Generally, the trial courts are organized into districts by state. For example, there is a United States District Court for the District of

Maryland. The appellate courts (with two exceptions) cover groups of states. And the Supreme Court governs them all.

The Federal trial appellate and supreme courts have the same general functions as their State counterparts. However, unlike state courts, the Federal courts have only the powers and authority which are expressly conferred on them by statutes enacted by the Congress as well as those inherent powers which are necessary to carry out their expressly assigned duties. Because they are thought to have limited powers, the Federal courts are called courts of **limited** jurisdiction.

Congress has, however, expressly provided the Federal courts with the authority to award damages, determine the lawfulness of certain acts, and issue injunctions. All of these powers are used in civil rights cases, and they have been extended to cover the rights of the handicapped.

D. ADMINISTRATIVE LITIGATION

The activities of government generate disputes. Tax claims, zoning exemptions, public assistance benefits, school admissions, school transfers, unemployment compensation and countless other disputes are generated daily by the activities of government. These are technically civil disputes. However, civil disputes between citizens and their governments are different from those between individuals because they are more numerous and the government is one of the parties. In order to reduce the volume of regular court litigation, and to ensure that governmental agencies are as free from judicial interference as possible, the States and the Federal government have established a series of administrative procedures for each agency or program (and in a few cases special courts) to resolve claims without the necessity of going to a regular court.

The administrative procedures usually consist of a hearing which is supervised by an administrative law judge entitled to decide cases arising under a particular statute. The hearing is like a trial before a judge. Evidence is introduced. Witnesses may be presented, and cross examination is allowed. The administrative law judge must then issue an opinion based on the evidence before him or her. In general, the

decision is final unless [1] the findings of fact are not adequately supported by the evidence or [2] the ruling is incorrect as a matter of law.

Only a court has the authority to overturn an administrative determination, and it may do so only on the grounds set forth above. A claimant may not sue in court until he or she has obtained an administrative ruling, and then the reviewing court may consider only whether [1] the findings of fact are adequately supported by the evidence and [2] the ruling is incorrect as a matter of law. The legal phrase is that the claimant is required to **exhaust administrative remedies** before filing suit.

E. SOURCES OF LAW

A hundred and fifty years ago the distinctions between State and Federal law were relatively clear. State law was administered by state courts, and Federal law by Federal courts. However, today the two are intermixed. State statutes supplement rights given by Federal law, and Federal statutes require Federal courts to apply State law in interpreting them. To complicate matters, many Federal civil rights statutes also permit suit in either state and federal court. This guide will concern itself primarily with rights granted by Federal statutes which are enforced by suit in Federal courts following the exhaustion of all required administrative remedies.

A major source of law which is often overlooked by non-lawyers are the vast numbers of regulations which are issued by Federal, State, and local governments. These regulations implement statutes in two basic ways. First, the regulations often define terms which appear in statutes but are not clearly defined there. Second, the regulations often explain just how a particular program is to be administered. The Federal regulations are set forth in the "Code of Federal Regulations" or CFR. They are cited by volume and section number, thus: 45 CFR § 84.1. The regulations are updated periodically. Amendments to them may be found in the Federal Register, a daily publication of the U.S. Government.

F. SUMMARY

The United States' judicial system consists of State Courts of general jurisdiction and Federal Courts of limited jurisdiction. State and Federal Courts generally operate independently of each other within the spheres assigned them by the United States Constitution. The United States Supreme Court has the final authority for interpreting the Constitution. Many cases, however, are required to be tried before State or Federal administrative agencies before being presented to a Court.

3 The Constitution

Most of the rights accorded ADD individuals as such are expressed in or derived from the Constitution of the United States. In general, **express** rights may be found in [1] the "equal protection" guarantees of the 14th Amendment or [2] the "due process" requirements of the 5th and 14th Amendments, while **derived** rights are contained in statutes which have been adopted to implement **express** rights.

The 14th Amendment is the most important source of rights. It provides in pertinent part that:

> Section 1 .... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws ....
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Note that the 14th Amendment applies to States and not to the Federal government. The 5th Amendment applies to the Federal government and contains the prohibition against deprivation "of life, liberty, or property, without due process of law...." While the 5th Amendment does not contain the equal protection guarantees, in practice, the 5th Amendment has been interpreted to include it. Note also that the 14th Amendment provides for the enactment of implementing legislation.

A. EQUAL PROTECTION

1. Basic Requirements

The 14th Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws ...." This commandment is the major source of rights for those with attention deficit disorder as it is for other learning disabled and handicapped individuals. Historically those rights grew out of the requirement of equal access to education. While the States have no obligation to provide free public education, all States do, and when they do, that education must be available to all. **Brown v. Board of Education** 347 U.S. 483 (1954) While **Brown** is cited primarily for its racial classification holding, it also stands for the proposition that the equal right to an education is a fundamental human right. The Court said:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. 347 U.S. 483, at 493

The equal "fundamental rights" analysis of **Brown** has been followed in landmark cases involving the handicapped and learning disabled. In **Pennsylvania Association For Retarded Children v. Commonwealth**, 334 F. Supp. 1257 (E.D. Pa. 1971), the Court found that an educational system which excluded the retarded raised "serious doubts (and hence a colorable claim) as to the existence of a rational basis for such exclusions." 343 F. Supp. 279 at 297.

In **Mills v. Board of Education of the District of Columbia**, 348 F. Supp. 866 (D. D.C. 1972), the Court, citing **Brown** and quoting **Hobson v. Hansen**, 269 F. Supp. 401 (D.D.C. 1967) at 493 concluded that:

> the doctrine of equal educational opportunity-the equal protection clause in its application to public school education-is in its full sweep a component of due process binding on the

District under the due process clause of the Fifth Amendment.

348 F. Supp. 866 at 875

Both **PARC** and **Mills** were cited with approval by the Supreme Court in **Honig v. Doe**, 484 U.S. 305 (1988). To implement these constitutional requirements, Congress enacted the Education For All Handicapped Children Act, 20 U.S.C. § 1400 et. seq. (now the Individuals with Disabilities Education Act , or IDEA); **Board of Education of Hendrick Hudson Central School District v. Rowley**, 458 U.S. 176 (1982) In doing so, the Congress relied on **Mills** and **PARC**, cited above.

The Congress, having cited **Brown, Mills,** and **PARC**, said:

> Parents of handicapped children all too frequently are not able to advocate the rights of their children because they have been erroneously led to believe that their children will not be able to lead meaningful lives. However, over the past few years, parents of handicapped children have begun to recognize that their children are being denied services which are guaranteed under the Constitution. It should not, however, be necessary for parents throughout the country to continue utilizing the courts to assure themselves a remedy. It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity. It can no longer be the policy of the Government to merely establish an unenforceable goal requiring all children to be in school. S. 6 takes positive necessary steps to ensure that the rights of children and their families are protected.
>
> Senate Report (Labor and Public Welfare Committee) No. 94-168 June 2 , 1975 1975 U.S. CODE CONG. & AD. NEWS at 1433.

The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et. seq. (IDEA) will be discussed at length below. The points for our present purpose are that [1] both the Supreme Court, and the Congress consider the equal protection requirements to apply to learning disabled and handicapped individuals and [2] most legislation addressing disabilities is intended to ensure that the right to equal treatment is recognized.

2. Standard of Review

The Courts review State actions to determine whether they infringe the 14th Amendment. The standards of judicial review applicable to constitutional challenges of statutes under the 14th Amendment have been frequently articulated by the United States Supreme Court.

The challenged statute must be examined to determine whether it is constitutionally suspect. Suspect statutes are usually those which require that individuals be treated differently depending on their race or gender, and these require that a close look "heightened scrutiny" be employed in deciding whether they are valid. Heightened scrutiny is warranted whenever the challenged act [1] employs a suspect classification or [2] "directly and substantially" interferes with and burdens a fundamental right. **Lyng v. Castillo**, 477 U.S. 635 (1986) In the event that neither a suspect classification nor a fundamental right is involved, the act must [3] be rationally related to a legitimate state interest. **City of Cleburne v. Cleburne Living Center, Inc.**, 473 U.S. 432 (1985). Each of these is discused below.

3. Suspect Classifications

Racial and sexual classifications are presently the predominant suspect classifications. In **City of Cleburne v. Cleburne Living Center, Inc.**, 473 U.S. 432 (1985), the Supreme Court held that mental retardation was not itself a suspect classification which warranted heightened scrutiny (though it struck down the statute on other grounds). It is almost certain that attention deficit disorder will receive the same judicial treatment.

4. Fundamental Rights

Considerable controversy surrounds the question of which rights are fundamental and which not. The Supreme Court has recognized as fundamental, for example, rights of privacy **Griswold v. Connecticut**, 381 U.S. 479 (1965) and the right to live together. **Moore v. City of East Cleveland, Ohio**, 431 U.S. 494 (1977) (Zoning ordinance prohibiting home owners from living with offspring of more than one child held invalid.) There is also a fundamental constitutional right to private education. In **Pierce v. Society of Sisters**, 268 U.S. 510 (1925), the Supreme Court held invalid an Oregon statute which prohibited private school education of children between the ages of eight and sixteen. **Pierce v. Society of Sisters** involved a private parochial school, and, as a result, it is most often cited as authority for the proposition that private religious schools may not be banned. However, a companion case, decided with it, **Pierce v. Hill Military Academy** (also 268 U.S. 510) involved a private non-sectarian military academy. The Court's reasoning addressed both suits, and proceeded from a recognition that a ban on private education abridged a fundamental human right. Note that these "fundamental rights" are ones which arise under the Due Process clauses of the 5th and 14th Amendments.

5. Rational Basis

The prevailing constitutional formulation is that an Act must bear a reasonable relationship to a legitimate end. In applying this test, however, the Court must weigh the value of the rights affected, the extent of the limitation to be placed on those rights, and the public need for restriction in order to determine whether the Act is constitutional. **Plyler v. Doe**, 457 U.S. 202, (1982) It is therefore clear that statutes must be evaluated under a rational basis analysis which takes account of the classifications and their impact on education for the learning disabled as significant factors in deciding whether a "substantial goal" of the State is being furthered and hence whether they are reasonable.

6. Conclusion

Persons with attention deficit disorder are entitled to the equal protection of the laws. In general, this means that they are entitled to equal access to education,

employment, and housing. Attention deficit disorder is not a suspect classification which warrants heightened judicial scrutiny, but a State action may "directly and substantially" interfere with or burden fundamental rights of ADD individuals or it may fail to be rationally related to a legitimate state interest. In such an event, the statute will be held invalid.

B. DUE PROCESS

The 5th Amendment (which applies to the Federal government) and the 14th Amendment (which applies to the States) contain prohibitions against the deprivation "of life, liberty, or property, without due process of law." There are two types of due process, **substantive** due process and **procedural** due process.

1. Substantive Due Process

A statute violates substantive due process when it seeks to deny an individual one or more of his or her fundamental rights. Examples of fundamental rights are given above. In general, these have been the right to privacy, the right to associate, and the right to chose private education over public education. All of these rights are considered fundamental because they are thought to be similar to rights which are expressly provided for in the Constitution. It would most probably be a violation of substantive due process for a State to refuse to educate children with attention deficit disorder.

2. Procedural Due Process

Procedural due process is simply the requirement that the government may not take life, liberty, or property without using fair procedures that are applicable to all. For example, a hearing which did not allow for an adequate presentation of evidence by all parties to it would violate procedural due process.

3. Conclusion

A lack of due process can often be shown by demonstrating that groups which should be treated equally have not been. Therefore, as a practical matter, the equal protection and due process requirements substantially overlap one another.

C. SUMMARY

The 5th and 14th Amendments to the United States Constitution are the most important source of Constitutional rights for the handicapped. The 14th Amendment provides in pertinent part that [1] "No State shall ... deny to any person within its jurisdiction the equal protection of the laws" or [2] "deprive any person of life, liberty, or property, without due process of law." Section 5 of the 14th Amendment provides that the "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The 5th Amendment contains the identical due process language. The nation's policy toward the handicapped is expressed in statutes which are authorized by and implement these Constitutional provisions.

4 The Rehabilitation Act of 1973

A. BACKGROUND

In the mid-1970's Congress adopted legislation whose purpose was to end discrimination against the handicapped generally and to improve the educational and other services available to them. The results of this concern were section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which prohibited discrimination against the handicapped in programs receiving federal financial assistance, and the Individuals with Disabilities Education Act , or IDEA (formerly the Education for All Handicapped Children Act of 1975), 20 U.S.C. 1400 et seq., which established an extensive federal-state program to secure a "free appropriate public education" for all handicapped children and expanded federal funding of state educational efforts for this purpose.

Both statutes have the following basic objectives: (1) that handicapped persons, regardless of the nature or severity of their handicap, be provided a free appropriate public education, (2) that handicapped students be educated with non-handicapped students to the maximum extent appropriate to their needs, (3) that educational agencies undertake to identify and locate all unserved handicapped children, (4) that evaluation procedures be improved in order to avoid the inappropriate education that results from the misclassification of students, and (5) that procedural safeguards be established to enable parents and guardians to influence decisions regarding the evaluation and placement of their children. (Note that both acts are **supplemented** by 42 U.S.C. § 600 et seq., the Developmentally Disabled Assistance and Bill of Rights Act. However, this statute is probably of little value to ADD individuals, since ADD is addressed by both statutes in the manner discussed below.)

However, the Acts differ. The RA is intended to prohibit discrimination while the IDEA is intended to ensure a free appropriate education. The RA is more general in nature, and employs a definition of handicap which is broader than the IDEA. Therefore, it is perfectly possible for a school district, for example, to violate the RA by failing to provide a handicapped individual with a free appropriate education even though the individual was not entitled to it under the IDEA.

There are three exceptions. 34 CFR § 104.33(b)(2) 34 CFR § 104.35(d) 34 CFR § 104.36 which deal with the IEP, discussed below, provide that compliance with the IEP requirements of the IDEA will also constitute compliance with the RA. Otherwise, compliance with one does not necessarily constitute compliance with the other, nor does the violation of one necessarily constitute violation of the other.

The regulations issued under the IDEA and the Rehabilitation Act are closely similar. However, IDEA is administered by the Department of Education, while the RA is administered by Health and Human Services. While there is a great overlap between the two Acts, it is substantially more certain that ADD is considered a handicapping condition under the RA than under the IDEA.

B. COVERAGE

The Rehabilitation Act of 1973 (29 U.S.C. § 701 *et seq.*) was adopted to aid the handicapped in securing rehabilitation training, access to public buildings and employment. The Act requires fair treatment of the handicapped by [1] the United States Government (29 U.S.C. § 791) [2] contractors with the United States Government (29 U.S.C. § 793) and [3] recipients of Federal funds (29 U.S.C. § 794). This latter provision (popularly known as Section 504) covers all Federal grant and aid recipients. Most notably, it applies to virtually all primary and secondary educational institutions.

The RA contains the following definition of a disability. A handicapped individual is "any individual who:

(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities,

(ii) has a record of such an impairment, or

(iii) is regarded as having such an impairment. 29 U.S.C. § 706(8)(A).

The Rehabilitation Act applies to individuals with attention deficit disorder. In **Matter of Cecelia A. Berard**, OCR No. 04-90-1617 (17 Sep 90), the Department of Education Office of Civil Rights ruled that the Gaston County School District of North Carolina (which received Federal funding) failed to identify, evaluate, and provide the complainant's ADD child with a free public education appropriate to his disorder and thereby violated the RA. (29 U.S.C. § 794). RA and IDEA coverage of ADD was addressed in the Department of Education's Memorandum of the Office of Special Projects and Rehabilitative Services, dated 16 September 1991. This Memorandum was signed by The Assistant Secretaries of the Office of Special Education and Rehabilitative Services, the Office of Civil Rights and the Office of Elementary and Secondary Education. It represents the official position of the Department of Education on these points.

The ruling and Memorandum are particularly important because [1] they establish the right of an ADD individual to equal education under the RA [2] the right is independent of the rights conferred by the IDEA and [3] the RA definition of handicapped individual has been utilized in the Americans With Disabilities Act which was passed in July 1990 and is discussed below. As noted above, it is substantially broader than the definition in the IDEA.

C. THE FEDERAL GOVERNMENT

Each agency of the Federal government is required to prepare and implement an affirmative action program for the hiring, placement and advancement of handicapped individuals. (29 U.S.C. § 791) The statutory mandate is reflected in 29 CFR § 1613.703 which establishes the basic rule:

> Agencies shall give full consideration to the hiring, placement, and advancement of qualified mentally and physically handicapped persons. The Federal Government shall become a model employer of handicapped individuals. An agency shall not discriminate against a qualified physically or mentally handicapped person.

The program is administered by the Equal Employment Opportunity Commission. The definition of a handicapped individual includes:

> any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 CFR § 1613.702(b)(2).

This is a common formulation. Substantially similar language is applied to Federal grant and aid recipients. See for example 28 CFR § 42.540(i)(B).

D. GOVERNMENT CONTRACTORS

Each agency of the Federal government is required to include in its contracts, clauses which obligate the contractor to prepare and implement an affirmative action program for the hiring and advancement of "qualified individuals with handicaps". (29 U.S.C. § 793) The obligation is company wide and exists as long as the company holds any contract requiring the affirmative action program. Note that the statute does not expressly prohibit discrimination by contractors. However, regulations issued by the Department of Labor which supervises the program, do prohibit discrimination.

E. GRANT AND AID RECIPIENTS

Recipients of Federal funds are prohibited from discriminating against individuals "solely by reason of her or his handicap." [29 U.S.C. § 794(a)] Affirmative action is not required. (Note: the citations are given as examples. They are to the regulations which are issued by the Department of Justice. Each agency has its own.)

28 CFR § 42.503(a) provides the basic requirement in terms substantially the same as the RA:

> (a) General. No qualified handicapped person shall, solely on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program receiving or benefiting from Federal financial assistance.

Here are the basic ground rules.

■ An employer may refuse to hire or promote an individual who is unable to perform the essential elements of a job because of his/her handicap. 28 CFR §§ 42.512; 513 (a)

■ An employer may not list as job essential, elements which are not. 28 CFR § 42.510(2)

■ An employer may inquire and test concerning physical or mental qualifications essential for the job. General or unrelated inquiries may not be made. 28 CFR § 42.513

■ An employer must make "reasonable accommodation" for the handicap. 28 CFR § 42.511

■ Most public schools, together with a great many private colleges and graduate schools are subject to these requirements because they receive Federal funds. The

extent of their obligation under the RA depends on the nature of the Federal assistance involved.

F. FAIR HOUSING

The RA contains authority for the issuance of regulations which apply to the activities of the Department of Housing and Urban Administration whose activities consist largely of programs to rejuvenate the inner city and to provide rent subsidies. HUD programs are implemented by title 24 of the CFR. 24 CFR ¶ 8.4 outlaws discrimination in HUD programs, while 24 CFR ¶¶ 8.10-8.13 govern employment and reasonable accommodations.

G. ENFORCEMENT

The RA may be enforced by civil suit, either by itself, or in combination with the IDEA, and -in appropriate cases- civil rights statutes such as 42 U.S.C. §1983 which imposes civil liability on one who deprives another of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. In deciding whether 42 U.S.C. §1983 provides a right of action in a particular case, the Supreme Court has held that the relevant questions are whether 1] the right in question is "secured" by a Federal statute and 2] the Federal statute in question provides the exclusive remedy. **Maine v. Thiboutot**, 448 U.S. 1 (1980); **Pennhurst State School & Hospital v. Halderman**, 451 U.S. 1 (1981). The selection of appropriate statutes to invoke must be made on the facts of a particular case. However, the RA has been held to permit suit under this Act in some situations. ACTIONS, UNDER 42 USCS § 1983, FOR VIOLATIONS OF FEDERAL STATUTES PERTAINING TO RIGHTS OF HANDICAPPED PERSONS, 63 ALR Fed 215.

H. SUMMARY

Under the RA an ADD person has the right to be free from discrimination because of his handicap.

5 The Individuals With Disabilities Education Act

A. COVERAGE

1. Background

In 1975, Congress enacted the Education of the Handicapped Act (now the Individuals with Disabilities Education Act or IDEA) 20 U.S.C. § 1400 *et seq.* The purpose of the IDEA was "to assure that all handicapped children have available to them . . . a free appropriate public education ... which emphasizes special education and related services designed to meet their unique needs ... [and] ... to assure that the rights of handicapped children and their parents or guardians are protected ...." 20 U.S.C. § 1400(c).The ultimate purpose of the Act was to ensure that handicapped children receive the equal protection of the law as discused above. Under the provisions of the Act, funds are provided to local school systems for the education of children between the ages of 3 and 21. Local schools are required to comply with the Act and its implementing regulations as a condition of receiving funds. (These funds are provided under the authority of 20 U.S.C. § 1411 et seq. and are colloquially referred to as "Part B Funds".) Attention Deficit Disorder is not mentioned by name in the Act.

To accomplish these objectives, the Act provides federal money to state and local educational agencies that undertake to implement the substantive and procedural requirements of the Act. A state may elect to participate in the federal grant-in-aid program established by the IDEA by meeting the eligibility requirements set forth in 20 U.S.C. §1412, including a demonstration that it has put into effect "a policy that assures all children with disabilities the right to a free appropriate public education." 20 U.S.C. §1412(1). As a further prerequisite for the receipt of federal

federal funds, the state must submit a detailed state plan which meets the requirements of the federal statute. 20 U.S.C. §1413.

2. Statutory Language

The term "attention deficit disorder" (ADD) does not appear in the IDEA. The term was first coined in 1980 when the Diagnostic and Statistical Manual of Mental Disorders (DSM) III was published. ADD replaced the name "hyperactivity" which had enjoyed some currency for a number of years as the descriptive term for an attention and impulse disorder first noted in young children. "Hyperactivity" had in turn been preceded by "minimal brain dysfunction" as the name for that disorder. Coverage for ADD children must be found in the existing statutory language.

20 U. S.C. § 1401(a)(1) includes in the definition of "children with disabilities" those children:

> (A) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, **serious emotional disturbance**, orthopedic impairments, autism, traumatic brain injury, **other health impairments**, or **specific learning disabilities** ; and
>
> (B) who, by reason thereof need special education and related services. (Emphasis added)

There has been considerable controversy concerning the question whether the IDEA applies to individuals who have only ADD but no accompanying learning disability. This question has been resolved by the Department of Education's Office of Special Education and Rehabilitative Services (OSEP) in a memorandum issued on 16 September 1991. In it, the Department of Education confirmed that ADD can be considered within the scope of the IDEA - depending on the circumstances- as 1] an "other" health impairment 2] a "serious emotional disturbance" or 3] a "specific learning disability". Each of these is discussed below:

3. "Other" Health Impairment

20 U. S.C. § 1401(a)(1)(A) includes in the definition of "children with disabilities" those with "other health impairments" than the ones specifically listed. The Department of Education has determined that ADD fits most naturally into this category. It said:

> The list of chronic or acute health problems included within the definition of 'other health impaired' in the ... regulations is not exhaustive. The term 'other health impaired' includes chronic or acute impairments that result in limited alertness, which adversely affects educational performance. Thus, children with ADD should be classified as eligible for services under the 'other health impaired' category in instances where the ADD is a chronic or acute health problem that results in limited alertness, which adversely affects educational performance. In other words, children with ADD, where the ADD is a chronic or acute health problem resulting in limited alertness, may be considered disabled under ...(the IDEA)... solely on the basis of this disorder within the 'other health impaired' category in situations where special education and related services are needed because of the ADD.
>
> (Memorandum, Office of Special Projects and Rehabilitative Services, Department of Education, 16 September 1991, p.3)

The Department of Education's position is welcome and much needed. However, it should be noted that, while a "specific learning disability" is recognized in most Federal laws and regulations as a handicap, "other" health impairments are not. Therefore, ADD advocates may have to wage a statute by statute campaign to obtain recognition.

4. "Specific Learning Disability"

The Department of Education has also determined that children with ADD can qualify for services under the specific learning disability category. It said:

> Children with ADD are also eligible for services under ...(the IDEA)... if the children satisfy the criteria applicable to other disability categories. For example, children with ADD are also eligible for services under the 'specific learning disability' category of ... (the IDEA)... if they met the criteria stated in §§300.5(b)(9) and 300.541....
>
> (Memorandum, Office of Special Projects and Rehabilitative Services, Department of Education, 16 September 1991, pp. 3-4)

Children with ADD may meet the criteria for services under the "specific learning disability" criteria because of co-existing specific learning disabilities. An argument can be made that ADD in a particular case does met the criteria for "specific learning disabilities." The statutory language is important. 20 U. S.C. § 1401(a)(1)(A) defines "children with disabilities" to include those who have "specific learning disabilities." And 20 U. S.C. § 1401(a)(15) provides the following definition of a learning disability:

> (a)(15) The term 'children with specific learning disabilities' means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations. Such disorders include such conditions as perceptual disabilities, brain injury, **minimal brain dysfunction**, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of

> emotional disturbance, or of environmental, cultural, or economic disadvantage. (Emphasis Added)

The Act is implemented by 34 CFR § 300.5(b)(9) which repeats the terms of 20 U. S.C. § 1401(a)(15).

5. "Minimal Brain Dysfunction"

ADD in a particular case may constitute minimal brain dysfunction. Neither the IDEA nor its legislative history defines "minimal brain dysfunction." However, "minimal brain dysfunction has a well established meaning. The history of the term is described in the LEARNING DISABILITIES: A REPORT TO THE U.S. CONGRESS prepared by the Interagency Committee on Learning Disabilities in 1987.

> What is termed 'ADD' had its origins in the late 19th century when physicians first observed the association of behavioral symptoms following an insult to the brain. Throughout the early part of this century, specific kinds of insults (for example, head injury and infections of the central nervous system) had been linked to a constellation of behaviors termed the 'brain damage' syndrome. By the late 1930s and 1940s, Dr. A. A. Strauss and his associates had promulgated the notion that these behavioral manifestations could themselves be evidence of brain damage. Rather than starting with known brain injury causing a particular constellation of behaviors, Strauss considered the abnormal behaviors, in and of themselves, indicative of brain damage. Over time, the occurrence of the behavioral symptoms without a history of brain insult was termed <u>minimal</u> brain damage, and then <u>minimal</u> brain dysfunction.
>
> LEARNING DISABILITIES: A REPORT TO THE U.S. CONGRESS Interagency Committee on Learning Disabilities (1987) at 194-195.

The term "minimal brain dysfunction" applied to all learning and behavioral difficulties of the type which **could** have resulted from an undisclosed brain injury. It therefore covered all brain based learning problems.

Moreover, the term "minimal brain dysfunction" is still used to refer to hyperactivity, and ADD. Specifically, the term is used in such authoritative sources as [1] the DSM-III-R index and [2] THE MERCK MANUAL (15th Ed. 1987). The are considered synonymous (though the usage is outdated) by the medical profession.

Current research being conducted by the National Institutes of Mental Health suggests that the term "minimal brain dysfunction" may be a fair characterization of the disorder. The study, conducted by Dr. Alan Zametkin, and reported in The New England Journal of Medicine for 15 November 1990, analyzed the brain activity of hyperactive adults in some 60 areas, utilizing positron emission topography (PET) scans which measure glucose metabolism, and found that they were significantly less active in the premotor cortex and the superior prefrontal cortex than the controls. The study is ongoing, but when completed, should demonstrate that the immediate cause of attention deficit disorder lies in the inability of several brain areas to function adequately which in turn prevents the brain from processing glucose at sufficient rates. This inability is quite literally a dysfunction, and one which is minimal when compared to most brain damage and defects. It is quite literally "minimal brain dysfunction."

Federal law also equates the terms "minimal brain dysfunction", "attention deficit disorder", "hyperactivity", and "learning disabilities" in a variety of contexts. In addressing the problems of lead based paint, the Consumer Product Safety Commission's regulations note that lead based paint causes "behavioral and functional disorders which are often included under the heading of minimal brain dysfunction. Studies suggest that this syndrome may include hyperactivity ...." 16 CFR § 1303.5(a)(2). The Food and Drug Administration has found that amphetamines are used "for such purposes as narcolepsy and minimal brain dysfunction in children ...." 21 CFR § 310.504(a)(2). See also **United States v. Welch**, 745 F.2d 614 (10th Cir. 1984), a prosecution for making threatening statements about the President, in which the medical experts used the terms "minimal brain dysfunction" and "attention deficit disorder" interchangeably.

Therefore the historical, medical, scientific, and legal meanings of the term "minimal brain dysfunction" include attention deficit disorders, and so, arguably, does the IDEA's definition of a specific learning disability.

6. "Seriously Emotionally Disturbed"

The final Department of Education category is that for "seriously emotionally disturbed" children. Children with ADD may meet the criteria for services under this category if they have a co-existing disturbance that meets the criteria. The criteria are ill focused and broad. The category would not appear to be a satisfactory fit for ADD. The Department's 16 September 1991 memorandum provides:

> Children with ADD are also eligible for services under ... (the IDEA) ... if the children satisfy the criteria applicable to other disability categories. For example, children with ADD are also eligible for services under ... the 'seriously emotionally disturbed' category ... (of the IDEA) ... if they meet the criteria stated in §300.5(b)(8).
>
> (Memorandum, Office of Special Projects and Rehabilitative Services, Department of Education, 16 September 1991, pp.3-4)

§ 300.5(b)(8) provides:

> (8) *Seriously emotionally disturbed* is defined as follows:
>
> (i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:
>
> (A) An inability to learn which cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes children who are schizophrenic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

This classification includes major mental illnesses, depression, personality disorders together with behavior disorders. It is often a catch-all for children who demonstrate serious learning or behavior problems whose causes are not understood.

7. The Derry School District Case

The courts are on the verge of resolving the matter. In **Valerie J. and Michael J. Individually and as Parents and Next Friends of Casey J. v. Derry Cooperative School District,** 771 F. Supp. 483; (D. N.H. 1991) the Court gave the clearest acknowledgement to date that ADD is covered by the IDEA. In that case, the Court held that an Individualized Education Plan (IEP) was not appropriate for an ADD child under the IDEA where the School addressed an ADD child's behavior problems by 1) suspending the child for 20 days 2) ordering the parents to cope with the behavior problems by coming to the School to pick up the child during the school day (in reality mini-suspensions) and 3) refusing to educate the child further until the parents consented to medicate the child (with Ritalin or Cylert). The Court

Court did not address the question of whether ADD was a handicapping condition under the IDEA (the child had other handicaps also), and if so, which language covered it, but the IEP could not have been unsuitable and the Court could not have ruled as it did unless the IDEA covers ADD.

In **Kirchgessner v. Davis**, 632 F. Supp. 616 (W.D. Va. 1986), the Court appears to have assumed, without expressly deciding, that ADD is a specific learning disability under the IDEA for it described the plaintiff as:

> 'a twelve year old boy who suffers from spinal bifida and learning disabilities such as Attention Deficit Disorder and Mixed Developmental Delay.' 632 F. Supp. 616 at 618

In **Honig v. Doe**, 484 U.S. 305 (1988) the Supreme Court, in applying the IDEA, described the plaintiff, an "emotionally disturbed" child:

> "... [D]espite above average intelligence, he experienced academic and social difficulties as a result of extreme hyperactivity and low self-esteem." 484 U.S. 305 at 314.

The question of whether ADD is a handicapping condition under the IDEA, was not argued by the parties or decided explicitly by the Supreme Court. The plaintiff's status as a handicapped individual was accepted without discussion.

The IDEA has been applied to persons who have multiple handicaps including ADD.

Norton School Committee v. Massachusetts Department of Education, 768 F. Supp. 900 (D. Mass. 1991)

Greer v. Rome City School District, 762 F. Supp. 936 (N.D. Ga. 1990)

Rapid City School District 51-4 v. Vahle, 733 F. Supp. 1364; (W.D. S. D.1990), *aff'd* , 922 F.2d 476 (8th Cir. 1990)

Liscio, ex rel. Hippensteel v. The Woodland Hills School District, 734 F. Supp. 689 (W.D. Pa. 1989) *aff'd* , 902 F.2d 1561 (3rd Cir. 1990)

In none of these cases did the Court suggest that the application of the IDEA is limited to those handicaps which appeared with ADD and does not extend to ADD itself.

B. EVALUATION

The regulations which implement the IDEA provide that:

> (a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 300.530-300.534. (34 CFR § 300.530)

The following are required:

- A "full and individual evaluation of the child's educational needs" termed a pre-placement evaluation. 34 CFR § 300.531

- Testing "tailored to assess specific areas of educational need." 34 CFR § 300.532(b) The testing must be more than generalized IQ testing and must be constructed to reflect his or her intellectual ability and not his or her impairment. It must use several criteria for assessing the child and not a single procedure as the "sole criterion". 34 CFR § 300.532(d)

- A team approach to evaluation. The evaluation must be "made by a multi-disciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability." 34 CFR § 300.532(e) Where a specific learning disability is at issue, the team must include the child's regular teacher or an equivalent person if there is no regular teacher and a person qualified to conduct individual diagnostic examinations. 34 CFR § 300.540

■ The assessment must be comprehensive. The child must be "assessed in all areas related to the suspected disability." It must include "social and emotional status", "general intelligence", "academic performance", "communicative status", and "motor abilities." 34 CFR § 300.532(f)

■ The placement decision must be made on the basis of the information developed and must be "made by a group of persons, including persons knowledgeable about the child", the "meaning of the evaluation data" and "the placement options". 34 CFR § 300.533(a)(3) In the case of a specific learning disability, a "team may determine that a child has a specific learning disability" if 1) the child "does not achieve commensurate with his or her age" in one of the areas listed below when presented with appropriate educational opportunities **and** 2) a "severe discrepancy" exists between potential and achievement in one of the following areas: (a) oral expression (b) listening comprehension (c) written expression (d) basic reading skill (e) reading comprehension (f) mathematical calculation and (g) mathematical reasoning **and** 3) the discrepancy is not "primarily the result of" a visual, hearing, or motor handicap, mental retardation, emotional disturbance or environmental, cultural or economic disadvantage. 34 CFR §§ 300.541(a), 300.541(b).

Note that the list includes many deficits that could be considered to arise from either a "specific learning disability" or from ADD. Indeed, some experts consider ADD to be a specific learning disability. They argue that there is no meaningful distinction between ADD inattention and that inattention which causes (for example) the letter scramblings and reversals typical of dyslexia. Both are inabilities to perceive, process, organize, and use written and spoken information.

And that brings us to a critical point. **You**, the advocate must decide whether to contend that a particular set of school problems results primarily from ADD as, or in conjunction with an other health impairment, a learning disability, or an emotional disturbance. Your decision cannot be made in a vacuum. Your decision must be made on the documented facts before you and the evaluations of your own experts. The important point is that there can be a range of opinion on the question of the source

of the source of a specific learning problem (or any other problem for that matter). To complicate matters, ADD and other specific learning disabilities may exist together, and in such a case, it becomes important for you the advocate to decide which should be given priority. The selection you make should be determined by the relief you are seeking and the statute you are seeking it under. You should accept as definitive only that expert advice which seems well supported and explains best the documented facts of the case.

C. FREE APPROPRIATE PUBLIC EDUCATION (FAPE)

The purpose of the IDEA is "to assure that all handicapped children have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs..." 20 U.S.C. § 1400(c) The Act defines a "free appropriate public education" to mean "special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with [an] individualized education program...." 20 U.S.C. § 1401(18).

1. The IEP

Each school must provide an appropriate educational program designed to meet the student's unique needs. This is termed an "individualized educational program" or IEP. See 20 U.S.C. § 1414(a)(5); 20 U.S.C. §§1401(20), 1412(4).

The development of an IEP requires the participation of a team of individuals, including the parents, the child, where appropriate, the child's teacher, designated specialists, and a representative of the public agency qualified to provide or supervise special education. See 20 U.S.C. § 1401(20); 34 C.F.R. §§ 300.343; 300.344.

An IEP consists of:

- a statement of the present levels of educational performance of the child
- a statement of annual goals, including short term instructional objectives
- a statement of specific educational services to be provided each child
- a statement of the extent to which each child will be able to participate in regular educational programs
- the projected dates for initiating services and the anticipated duration of services
- appropriate criteria and evaluation procedures for determining, at least annually, whether the instructional objectives are being achieved. 20 U.S.C § 1401(20); 34 CFR § 300.346.

The preparation of the IEP is the most important point at which you can help your child. It is the time at which your team of experts will have the opportunity to structure a program for your child. (See Chapter 12)

The requirement for a "free appropriate public education" is not a requirement that the school provide each student with an equal opportunity to achieve his or her full potential. Rather, the purpose of the IDEA is merely to provide "a basic floor of opportunity consistent with equal protection." Thus, a school district was not required to provide, as part of an IEP, a qualified sign-language interpreter to assist a deaf student despite the fact that the student was learning less than she would have without her handicap. The ruling may have been affected by the facts that the IEP already provided for a hearing aid, a special tutor, and a speech therapist, and the further fact that, even with her handicap, she was an above average student. **Board of Education of Hendrick Hudson Central School District v. Rowley**, 458 U.S. 176 (1982)

The decision is significant. It establishes that the IDEA was intended to do no more than assist States in meeting the **minimum** requirements of the 14th Amendment. Once that **minimum** has been met, no more is required. As a practical matter, an educational program will have to be glaringly deficient in order to be unconstitutional. And in fact this is the case with traditional learning disabilities where the States require that a student must be substantially behind before he or she qualifies for special education.

However, it is also clear that an outright refusal to address a handicapping condition most probably **does** violate the 14th Amendment and the IDEA. This raises the uniquely complicated question of what an IEP tailored for ADD individuals ought to contain. The question is "uniquely" complicated because ADD may be intermixed with other disorders, including learning disabilities.

The following are key elements of an IEP tailored for ADD individuals.

- Teachers should be educated in the characteristics of ADD, so that ADD behavior can be identified and distinguished from the normal misbehaviors which are addressed by each school's discipline system.

- ADD children should be educated about the disorder when diagnosed, and appropriate coping strategies should be taught.

- Learning should be stimulated through the predominant use of movies, tapes and other high stimulation materials.

- Instruction should occur on a schedule with a substantial number of short breaks to allow the ADD children to "regroup".

- Behavior modification techniques should be preferred over the traditional disciplinary methods used on non-ADD students.

- The severity of ADD impairment should not be measured by either the slowness of the learning process, as in the case of traditional learning dis-

abilities, or the exhaustion of the child's strength, vitality and alertness, as in the case of other health impairments. It should be measured by the impact on the child's ability to learn and on his or her ability to be retained in the school system if no remedial action is taken.

The Department of Education has addressed the accommodations which will probably be sufficient for the majority of ADD children:

> Examples of adaptations in regular education programs could include the following:
>
> > providing a structured learning environment; repeating and simplifying instructions about in-class and homework assignments; supplementing verbal instructions with visual instructions; using behavioral management techniques; adjusting class schedules; modifying test delivery; using tape recorders, computer- aided instruction, and other audio-visual equipment; selecting modified textbooks or workbooks; and tailoring homework assignments.
>
> Other provisions range from consultation to special resources and may include reducing class size; use of one-on-one tutorials; classroom aides and note takers; involvement of a 'services coordinator' to oversee implementation of special programs and services, and possible modification of nonacademic times such as lunchroom, recess, and physical education.
>
> (Memorandum, Office of Special Projects and Rehabilitative Services, Department of Education,16 September 1991, p.7)

The remarkable thing about an IEP for ADD individuals is that it is inexpensive to create and implement. Therefore, if the school system can be persuaded (or re-

quired) to create an IEP, it is probable that a suitable one can be constructed without imposing any great financial burden.

2. Mainstreaming

The IDEA requires that all handicapped children be educated in the least restrictive environment possible. This has meant that children must be placed in regular classes ("mainstreamed") to the maximum extent possible. The regular class may be supplemented with ancillary or "resource" services.

The Supreme Court's ruling in **Board of Education of Hendrick Hudson Central School District v. Rowley**, 458 U.S. 176 (1982) has been cited to require the use of mainstreaming. In **Springdale School District #50 of Washington County v. Grace**, 693 F. 2d 41 (8th Cir. 1982), *cert den.* 461 U.S. 927 (1983) the 8th Circuit held that the State of Arkansas could not require a deaf child to leave her local school district to attend a state residential school for the deaf. In so ruling, the Court held that the IDEA [1] expressed an overriding preference for mainstreaming and that [2] under **Rowley**, the maximum educational opportunity was not required.

3. Private School

Where no public facilities are available, private schools may be used and the cost should be defrayed at public expense.

4. Procedural Protections

a. In General

An additional federal requirement imposed on the states is the availability of procedures whereby the evaluation and placement of the child maybe challenged and reviewed. 20 U.S.C. §1415. The procedures generally consist of [1] access to information and [2] an administrative hearing within the state educational system. Federal law provides that a party may challenge the state's decision in state or federal court. 20 U.S.C. 1415(e)(2). They are described below.

b. Pre-Hearing Procedures

Congress incorporated a set of "procedural safeguards" to insure the full participation of the parents and proper resolution of substantive disagreements. Section 1415(b) entitles the parents "to examine all relevant records with respect to the identification, evaluation, and educational placement of the child," to obtain an independent educational evaluation of the child, to written prior notice of any decision to initiate or change the identification, evaluation, or educational placement of the child, and to present complaints with respect to any of these issues.

c. Administrative Hearing

If the parents are disatisfied with the IEP or the child's placement, the state must convene "an impartial due process hearing." See 20 U.S.C. §1415(b)(2). The right to a hearing includes the right to be represented by a lawyer, the right to subpoena witnesses, the right to present evidence, the right to confront and cross examine witnesses, the right to obtain a transcript of the proceedings, and the right to challenge an adverse decision in Court. Finally, there is the right to retain the child's placement until a decision is reached. See generally **Roland M. v. The Concord School Committee**, 910 F.2d 983 (1st Cir. 1990), *cert. den.* 111 S.C.1122 (1991) and **Burlington School Committee v. Massachusetts Department of Education**, 471 U.S. 359 (1985) for excellent discussions of these topics.

d. Court

The hearing's outcome is reviewable in either state or federal court. Specifically, it provides for judicial review in state or federal court to "[a]ny party aggrieved by the findings and decision" made after the due process hearing.

The Act confers on the reviewing court broad discretion to grant appropriate relief. See **Burlington School Committee v. Massachusetts Department of Education**, 471 U.S. 359 (1985) at 369 Specifically, it provides that "[T]he court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." § 1415(e)(2). The

court's focus is upon the educational program which finally emerges from the administrative review process, not the IEP as originally proposed.

The reviewing court is required to review the record before the agency but is permitted to add to that record where appropriate. Its decision must be one which is [1] independent of the administrative decision but which [2] gives "due weight" to the state agency's decision because it presumably reflects an educational expertise which the courts lack. **Board of Education of Hendrick Hudson Central School District v. Rowley**, 458 U.S. 176 (1982) Legally, this has been called a "bounded, independent decision", that is - bounded by the administrative record and additional evidence, but independent by virtue of being based on a preponderance of the evidence before the court. **Roland M. v. The Concord School Committee**, 910 F.2d 983 (1st Cir. 1990), *cert. den.* 111 S.C. 1122 (1991) In practical effect, it gives a reviewing court authority to overrule unjust state actions while deferring to those which are just.

The question of whether an IEP is "adequate and appropriate" is a mixed question of fact and law. Absent a showing that the wrong legal rule was employed, the Court of Appeals may review a district court's ruling only for clear error on the record as a whole.

D. SPECIAL EDUCATION AND RELATED SERVICES

The IDEA provides that an appropriate education includes "special education and related services." 20 U.S.C. § 1401(18) Special education is defined as "specially designed instruction ... to meet the unique needs of a child with a disability" [20 U.S.C. § 1401(16)] while related services are "transportation, and such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education". [20 U.S.C. § 1401(17)] A major issue presented here is whether psychiatric or counseling services may be considered "related"?

In general, the IDEA does not require school districts to provide medical services. 20 U.S.C. § 1401(17) However, psychiatric and other counseling services are related services where they are necessary to enable the student to complete the

program described in the IEP. **Mark R., v. Board of Education, Bremen Community High School District No. 228**, 546 F. Supp. 1027 (N.D. Ill. 1982), *aff'd*, 705 F. 2d 462 (7th Cir. 1983) See also **Tatro v. State of Texas**, 703 F.2d 823 (5th Cir. 1983) holding that the IDEA requires a State to provide catheterization several times daily to a student suffering from spinal bifida in order that the student could be placed in and benefit from a special education class in accordance with the IEP. Where psychiatric and other counseling services are not necessary to the implementation of the IEP, they are not required. **PAPACODA, ex. rel. Conlin v. State of Connecticut**, 528 F. Supp. 68 (D. Conn. 1981) Related services include residential placement where necessary to education but not otherwise. **Martin v. The School Board of Prince Georges County**, 3 Va. App. 197; 348 S.E.2d 857 (1986)

E. PLACEMENT

A public school system is not required to use private resources because they are superior to the public ones. **Hessler v. State Board of Education of Maryland**, 700 F.2d 134 (4th Cir. 1983) Their use may be required, however, if there is no public school equivalent. **Yaris v. Special School District of St. Louis County**, 558 F. Supp. 545 (E.D. Mo. 1983), *aff'd*, 728 F.2d 1055 (8th Cir. 1984)

F. COST OF SERVICES

As noted above, there is a statutory requirement that the child's placement not be disturbed pending the outcome of litigation. That is an excellent protection where the present placement is desirable and the school district has acted to change it. However, where the present placement is undesirable, the parents may want to change it immediately. However, if the change is made [1] without the school's agreement to pay for it or [2] in advance of a hearing which will decide the child's entitlement to it, the school district will not be liable for these costs. **Mark R., v. Board of Education, Bremen Community High School District No. 228**, 546 F. Supp. 1027 (N.D. Ill. 1982), *aff'd*, 705 F. 2d 462 (7th Cir. 1983); **PAPACODA, ex. rel. Conlin v. State of Connecticut**, 528 F. Supp. 68 (D. Conn. 1981)

G. COLLEGE

The IDEA has had its greatest impact on elementary and secondary schools. However, it also applies to colleges.

First, discrimination is outlawed:

> (a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance. 45 CFR ¶ 84.4(a)

This requires equal opportunity in admissions, financial aid, academic evaluations, and graduation in general terms. However, the regulations also specifically address academics:

> 45 CFR § 84.44 **Academic adjustments.**
>
> (a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student.... Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

The use of tape recorders is specifically addressed:

> (b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as

> the prohibition of tape recorders in classrooms ... that have the effect of limiting the participation of handicapped students in the recipient's education program or activity. 45 CFR § 84.44(b)

Examinations must test student knowledge. Examination results may not be influenced by handicaps.

> (c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure). 45 CFR §

The college must take steps to ensure that auxiliary aids are available.

> (d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking

> (2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients

> need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature. 45 CFR § 84.44(d)

The use of untimed tests, tape recorders, oral examinations, and (where possible) shorter papers would appear to be required where necessary to educate an ADD individual.

H. ENFORCEMENT

The IDEA may be enforced by civil suit, either by itself, or in combination with the RA, and -in appropriate cases- civil rights statutes such as 42 U.S.C. §1983 which imposes civil liability on one who deprives another of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. In deciding whether 42 U.S.C. §1983 provides a right of action in a particular case, the Supreme Court has held that the relevant questions are whether 1] the right in question is "secured" by a Federal statute and 2] the Federal statute in question provides the exclusive remedy. **Maine v. Thiboutot**, 448 U.S. 1 (1980); **Pennhurst State School & Hospital v. Halderman**, 451 U.S. 1 (1981). The selection of appropriate statutes to invoke must be made on the facts of a particular case. However, the IDEA has been held to permit suit under this Act. **Valerie J. and Michael J. Individually and as Parents and Next Friends of Casey J. v. Derry Cooperative School District,** 771 F. Supp. 483; (D. N.H. 1991); ACTIONS, UNDER 42 USCS § 1983, FOR VIOLATIONS OF FEDERAL STATUTES PERTAINING TO RIGHTS OF HANDICAPPED PERSONS. 63 ALR Fed 215.

I. SUMMARY

Under the IDEA a handicapped person has the right to a free appropriate public education. ADD is covered under the IDEA as a "specific learning disability", serious emotional or "other" health impairment. At least one case has recognized that an IEP which does not take account of an ADD student's needs is unsuitable. **Valerie J.**

and Michael J. Individually and as Parents and Next Friends of Casey J. v. Derry Cooperative School District, 771 F. Supp. 483; (D. N.H. 1991)

6 The Americans With Disabilities Act

A. BACKGROUND

The Americans With Disabilities Act (42 U.S.C. § 12101 *et seq.*) was passed in July 1990 for the purpose of ending discrimination against individuals with disabilities in the area of employment, education, public accommodations, and licensing of professional and other activities. It extends the coverage of basic civil rights legislation (including the RA) to a wide range of public and private entities. The ADA is implemented by regulations governing employment (under the jurisdiction of the EEOC; 42 U.S.C. § 12111), public services (under the jurisdiction of the Department of Justice; 42 U.S.C. §§ 12131, 12134), and public accommodations (also under the jurisdiction of the Department of Justice; 42 U.S.C. §§ 12181, 12186). In addition, the ADA extends the nondiscrimination provisions of the RA to employment by the Congress. (42 U.S.C. § 12209). The Act is implemented by regulations and will take effect in stages over the next two years.

B. BASIC CONCEPTS

1. *Definition of Disability*

The ADA contains a definition of disability which is virtually identical to that used in the RA and discussed in Chapters 4 and 5 above. For purposes of the Act:

> The term 'disability' means, with respect to an individual-
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such impairment; or

> (C) being regarded as having such an impairment. [42 U.S.C. § 12102(2)]

A person will be considered to be an "individual with a disability" if he meets any one of these three tests. (28 CFR §§ 35.104; 36.104) The Department of Justice explained:

> If an individual meets any one of these three tests, he or she is considered to be an individual with a disability for purposes of coverage under the Americans with Disabilities Act.
>
> 56 Fed. Reg. 35544 (1991) at 35548; See also 56 Fed. Reg. 35694 (1991) at 35698

The most important for our purposes is "Test A". The Department of Justice explained the origin of this criterion:

> Congress adopted this same basic definition of 'disability,' first used in the Rehabilitation Act of 1973 and in the Fair Housing Amendments Act of 1988, for a number of reasons. It has worked well since it was adopted in 1974. There is a substantial body of administrative interpretation and judicial precedent on this definition. Finally, it would not be possible to guarantee comprehensiveness by providing a list of specific disabilities, especially because new disorders may be recognized in the future, as they have since the definition was first established in 1974.
>
> 56 Fed. Reg. 35544 (1991) at 35548; See also 56 Fed. Reg. 35694 (1991) at 35698

The regulations which implement the Act provide that the term "disability" includes:

> any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental ill-

> ness, and specific learning disabilities .... 28 CFR §§ 35.104, 36.104

The Department of Justice confirmed that:

> This list closely tracks the one used in the regulations for section 504 of the Rehabilitation Act of 1973 .... 56 Fed. Reg. 35544 (1991) at 35548

Note that ADD is not specifically mentioned. However, the language of the RA on which the ADA is based has been held to cover ADD. See **Matter of Cecelia A. Berard**, OCR No. 04-90-1617 (17 Sep 90) discussed in Chapter 4. See also (Memorandum, Office of Special Projects and Rehabilitative Services, Department of Education, 16 September 1991) These rulings are part of the "body of administrative interpretation" under the RA which is preserved by the ADA. Therefore, ADA coverage is highly probable.

Probable, but not certain. The Department of Justice also said that:

> Physical or mental impairment does not include ... common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. However, a person who has these characteristics and also has a physical or mental impairment may be considered as having a disability for purposes of the Americans with Disabilities Act based on the impairment. 56 Fed. Reg. 35544 (1991) at 35549; 56 Fed. Reg. 35694 (1991) at 35698, 35699

Under the Department of Justice's example, conceivably an argument could be advanced that ADD behavior is nothing more than a combination of the common personality traits of inattentiveness, impulsivity, and restlessness. If this occurs, it will be doubly necessary to document the neurological source of ADD behavior.

Note that "Test A" also requires a showing that the disability has caused a substantial limitation of a "major" life activity. The Department of Justice's explanation of this requirement is as follows:

> *Substantial limitation of a major life activity.* Under Test A, the impairment must be one that 'substantially limits a major life activity.' Major life activities include such things as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.... A person with traumatic brain injury is substantially limited in the major life activities of caring for one's self, learning, and working because of memory deficit, confusion, contextual difficulties, and inability to reason appropriately. 56 Fed. Reg. 35544 (1991) at 35549; See also 56 Fed. Reg. 35694 (1991) at 35699

"Memory deficit", "confusion", "contextual difficulties" and "inability to reason appropriately" are accepted as substantial limitations on major life activities. ADD of this severity will probably be considered a disability under the ADA. However, unlike the SSI, discussed in Chapter 8, the ADA requires that the existence of disability be determined without reference to the beneficial effects of medication. The Department of Justice explained:

> ... [P]ersons with impairments, such as epilepsy or diabetes, that substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication. 56 Fed. Reg. 35544 (1991) at 35549; See also 56 Fed. Reg. 35694 (1991) at 35699

"Test B" ("record of such impairment") was intended to prevent discrimination on the basis of past impairments. It may be of some use to individuals with a record of childhood ADD which has been outgrown, but is unlikely to have further uses. "Test C" -"being regarded as having such an impairment"- was intended to prevent discrimination on the basis of conditions such as disfiguring burns which, while not

disabling in themselves, might lead to discrimination. 56 Fed. Reg. 35544 (1991) at 35549, 35550; 56 Fed. Reg. 35694 (1991) at 35699, 35700.

2. *Qualified Individual*

The ADA does not protect all disabled individuals. It applies only to a "qualified individual with a disability." For example, 42 U.S.C. § 12111(8) provides:

> The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

The requirements of the ADA have been summarized by the EEOC thus:

> If you have a disability, you must also be qualified to perform the essential functions or duties of a job, with or without reasonable accommodation, in order to be protected from job discrimination by the ADA. This means two things. First, you must satisfy the employer's requirements for the job, such as education, employment experience, skills or licenses. Second, you must be able to perform the ***essential functions*** of the job with or without ***reasonable accommodation***. Essential functions are the fundamental job duties that you must be able to perform on your own or with the help of a reasonable accommodation. An employer cannot refuse to hire you because your disability prevents you from performing duties that are not essential to the job.
>
> U.S. Equal Employment Opportunity Commission, THE AMERICANS WITH DISABILITIES ACT; YOUR RIGHTS AS AN INDIVIDUAL WITH A DISABILITY; EEOC-BK-18 (1991) at 2

This concept differs slightly from section to section of the Act. However, the purpose is the same - to eliminate all unnecessary and unjustified restrictions on disabled persons.

C. EMPLOYMENT

The ADA prohibits discrimination in employment by private employers, state and local governments, employment agencies, labor organizations, and labor-management committees, termed "covered entities" by the ADA. (Some of these private and governmental employers are already covered by the RA and by other provisions of the ADA.) 42 U.S.C. §§ 12111-12112; U.S. Equal Employment Opportunity Commission, THE AMERICANS WITH DISABILITIES ACT; YOUR RIGHTS AS AN INDIVIDUAL WITH A DISABILITY; EEOC-BK-18 (1991) (NOTE: the applicability of the Act to particular employers and its effective date varies depending principally on the size of the covered entity.) The employment provisions of the Act (Title I) are implemented by 29 CFR §§ 1630, 1602 and 1627. The basic requirement is that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a)

The Act applies to "qualified" individuals with disabilities (see ¶ B.2 *supra*) includes an extensive definition of discrimination, [42 U.S.C. § 12112(b)] and stringent rules on the permissible kinds of testing which can be employed. [42 U.S.C. §§ 12112(c)] Limited defenses are addressed in 42 U.S.C. §§ 12113 which provides in part:

> (a) In general
>
> It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a

> disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

The ADA generally protects learning disabled people from discrimination in employment. 42 U.S.C. § 12112(b) Specifically, the ADA prohibits discrimination in:

- recruitment
- hiring
- job assignments
- pay
- lay off
- firing
- training
- promotions
- benefits
- leave

> U.S. Equal Employment Opportunity Commission, THE AMERICANS WITH DISABILITIES ACT; YOUR RIGHTS AS AN INDIVIDUAL WITH A DISABILITY; EEOC-BK-18 (1991) at 3

Additionally, the ADA prohibits an employer from inquiring whether an individual has a disability or the extent of it. The individual must decide whether to disclose his/her handicap. The EEOC offers the following advice on disability disclosure:

> **Q. Should I tell my employer that I have a disability?**
>
> A. If you think you will need a reasonable accommodation in order to participate in the application process or to perform essential job functions, you should inform the employer that an accommodation will be needed. Employers are required to provide reasonable accommodation only for the physical or mental limitations of a qualified individual with a disability of which they are aware. Generally, it is the responsibility of the employee to inform the employer that an accommodation is needed.

> U.S. Equal Employment Opportunity Commission, THE AMERICANS WITH DISABILITIES ACT; YOUR RIGHTS AS AN INDIVIDUAL WITH A DISABILITY; EEOC-BK-18 (1991) at 7

Additionally, the ADA requires that an employer make reasonable accommodations (not resulting in undue hardship for the employer) to known physical and mental limitations. Reasonable accommodations include:

> • providing or modifying equipment or devices,
>
> • job restructuring,
>
> • part-time or modified work schedules,
>
> • reassignment to a vacant position,
>
> • adjusting or modifying examinations, training materials, or policies,
>
> • providing readers or interpreters, and
>
> • making the workplace readily accessible to and usable by people with disabilities.
>
> U.S. Equal Employment Opportunity Commission, THE AMERICANS WITH DISABILITIES ACT; YOUR RIGHTS AS AN INDIVIDUAL WITH A DISABILITY; EEOC-BK-18 (1991) at 3

The intent of the ADA is to prohibit discrimination against the disabled without disrupting the efficiency of the employer's operations by eliminating those barriers to the workplace which are unjustified.

D. STATE AND LOCAL GOVERNMENTS

The ADA prohibits discrimination by States, local governments and the National Railroad Passenger Corporation (termed "public entities" under the Act) 42 U.S.C. § 12131. It includes the following governmental bodies:

> any department, agency, special purpose district, or other instrumentality of a State or States or local government .... 42 U.S.C. § 12131(1)(B)

The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. It contains a different definition of qualified individual from that used with respect to employment. 42 U.S.C. § 12131(2) provides:

> The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, ... meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

The Act then addresses specific acts of discrimination in the State and Local government employment (28 CFR § 35.140) and in the provision of public services (28 CFR § 35.130). Self-evaluation of the "current policies and practices" of covered governmental bodies with a view to conforming them with the ADA is required. (28 CFR § 35.105) 56 Fed. Reg. 35694 (1991) at 355701.

E. PUBLIC ACCOMMODATIONS

The ADA prohibits discrimination by private entities whose operations "affect commerce". [42 U.S.C. § 12181(7)]. The Act provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.
>
> 42 U.S.C. § 121182(a)

The Department of Justice lists the following as covered by the Act:

1. Places of lodging.

2. Establishments serving food or drink.

3. Places of exhibition or entertainment.

4. Places of public gathering.

5. Sales or rental establishments.

6. Service establishments.

7. Stations used for specified public transportation.

8. Places of public display or collection.

9. Places of recreation.

10. Places of education.

11. Social services center establishments.

12. Places of exercise or recreation.

(56 Fed. Reg. 35544 (1991) at 35551)

Note that, in the case of privately operated firms, there are some exclusions based on the size and economic impact of the firm's business. However, it is likely that 1] the ADA standards will be adopted by many states and 2] the behavior of covered businesses will be copied by smaller ones.

The ADA mandates access to the activities of these organizations (28 CFR §36.202) in an integrated setting (28 CFR §36.203) Numerous specific practices are made illegal.

42 U.S.C. § 12182(b)(2)(A)(i) prohibits "the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered ...."

42 U.S.C. § 12182(b)(2)(A)(ii) prohibits "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations ...."

28 CFR § 36.204 addresses "Administrative Methods" in these terms:

> A public accommodation shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration that have the effect of discriminating on the basis of disability, or that perpetuate the discrimination of others who are subject to common administrative control.

42 U.S.C. § 12182(b)(2)(A)(iii) and (iv) address respectively, requirements for auxiliary aids and the removal of architectural barriers.

The Act finally addresses access to transit, entertainment, lodging, and food services and telecommunications relay services by physically handicapped individuals. While these requirements are among the most notable of those imposed by the ADA, they have little importance for ADD individuals.

The ADA specifically addresses three areas of vital concern to ADD individuals. These are the matters of insurance, education, and licensing.

1. *Insurance*

Insurance companies are public entities. The sale of insurance policies is subject to the ADA unless specifically excepted. The basic exception is stated by 28 CFR §§ 36.212 which provides in pertinent part:

> (a) This part shall not be construed to prohibit or restrict-
>
> (1) An insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; ...

The Department of Justice explained the effect of the ADA and the exception thus:

> Language in the committee reports indicates that Congress intended to reach insurance practices by prohibiting differential treatment of individuals with disabilities in insurance offered by public accommodations unless the differences are justified. 'Under the ADA, a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks' (Senate report at 84; Education and Labor report at 136). Section 501(c)(1) of the Act was intended to emphasize that 'insurers may continue to sell to and underwrite individuals applying for life, health, or other insurance on an individually underwritten basis, or

> to service such insurance products, *so long as the standards used are based on sound actuarial data and not on speculation'* (Judiciary report at 70 (emphasis added); see also Senate report at 85; Education and Labor report at 137).
>
> The committee reports indicate that underwriting and classification of risks must be 'based on sound actuarial principles or be related to actual or reasonably anticipated experience' (see, *e.g.*, Judiciary report at 71). Moreover, 'while a plan which limits certain kinds of coverage based on classification of risk would be allowed *** the plan may not refuse to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience' (Senate report at 85; Education and Labor report at 71). The ADA, therefore, does not prohibit use of legitimate actuarial considerations to justify differential treatment of individuals with disabilities in insurance.
>
> 56 Fed. Reg. 35544 (1991) at 35562, 35563

The Department of Justice also addressed the question of how the denial of coverage for a known disability could permissibly affect other coverage.

> With respect to groups health insurance coverage, an individual with a pre-existing condition may be denied coverage for that condition for the period specified in the policy, but cannot be denied coverage for illness or injuries unrelated to the pre-existing condition.
>
> 56 Fed. Reg. 35544 (1991) at 35563

To put the matter in a nutshell, the ADA prohibits the discriminatory sale of insurance and benefit plans unless and to the extent that the classifications are based on sound actuarial data and not on speculation.

Since little is known about adult ADD, it is unlikely that there are comprehensive actuarial studies available with which to justify the differential treatment of ADD individuals. Two cases decided under Title VII of the Civil Rights Act of 1964 illustrate potential problems. In **Los Angeles Dept. of Water and Power v. Manhart** , 435 U.S. 702 (1978), the Supreme Court held unlawful an employer's pension plan which required that women make larger monthly contributions than men in order to obtain the same monthly benefit. And in **Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris,** 463 U.S. 1073 (1983), the Supreme Court held that pension plans which had roughly the same present annuity value but lower monthly payouts for women were discriminatory notwithstanding the fact that the payout schedules involved were based on actuarial data reflecting the greater longevity of women as a group. In the latter case, the Supreme Court noted that the longevity calculation were made solely on the basis of sex classifications which did not consider factors such as smoking habits, alcohol consumption, weight, medical history, and family history. The Supreme Court appears to have held the view that, if the longevity tables had considered these factors as well, they would have been acceptable.

If these cases are useful precedents (and there can be considerable doubt on this question since they were not decided under the ADA), the use of actuarial data which is based only on the existence of a specific disability may be illegal, but actuarial data which includes the disability as one of several factors may be proper. If this is the approach ultimately sanctioned by the Courts, it will be one consistent with the requirements of individualized inquiry discussed in Chapter 7 above.

2. *Education and Licensing*

The ADA does not duplicate the IDEA coverage. Therefore, there is no ADA requirement for schools to provide a free appropriate public education or individualized education plans. 56 Fed. Reg. 35544 (1991) at 35552 However, private institutions which offer secondary education, post secondary education, courses of in-

struction for professional licensing, and courses for instruction in the acquisition of specific skills are covered. The basic requirement is 28 CFR § 36.309 which provides in part:

> **Examinations and courses.**
>
> (a) *General.* Any private entity that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional or trade purposes shall offer such examinations and courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

Examinations must, where the disabled individual has a disability that "impairs sensory, manual, or speaking skills" assure that the "examination is selected and administered so as best to ensure" that the examination results:

> accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure); [28 CFR § 36.309(b)(i)]

Course modifications are required. 28 CFR § 36.309(c). However, access to the test does not of itself mean access to the profession where there are other requirements (such as graduation from Medical or Law School) which must be met. 56 Fed. Reg. 35544 (1991) at 35573 The individual will still have to meet all prior requirements. Note, though, that these requirements themselves are subject to the terms of the ADA.

The regulations in short cover High School, College, Graduate School, courses for specific skills such as driver's licenses, computer operation and many more. Quasi-public licensing authorities are also covered either under this regulation or Title II (State and Local Governments).

The ADA will not have an impact on most traditional educational institutions. Almost all private educational institutions were already covered under § 504 of the RA depending on the amount and nature of the federal assistance they receive. The ADA has highlighted these requirements, however, and colleges and graduate schools will be very careful to make reasonable accommodations to learning disabled students. However, the ADA will have a profound effect on those 1] which do not receive federal funds 2] which offer training courses and 3] which teach skills necessary to the issuance of licenses.

F. ENFORCEMENT

The Act contains various enforcement mechanisms. These include actions by the EEOC, Justice Department, and (where the ADA overlaps with the RA, the Department of Labor) as well as private actions.

The ADA enforcement provisions are borrowed from the Civil Rights Act of 1964. They permit civil suits by individuals who are limited to injunctive relief and back pay. However, the Department of Justice on behalf of an individual can pursue fines and penalties. The ADA also encourages the use of alternative disputes resolution (ADR) techniques such as settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials and arbitration to the extent they are "appropriate" and "authorized by law." 42 U.S.C. § 12212 Accordingly, it can be hoped that the resolution of disputes under the ADA will prove to be less time consuming and expensive than under other statutes. Finally, 42 U.S.C. § 12203 contains prohibitions against retaliation or coercion which is designed to prevent a person from exercising his or her rights under the Act. Attorneys' fees may be awarded to the prevailing party in such an action. 42 U.S.C. § 12205

G. CONCLUSION

The ADA protects qualified individuals with disabilities from discrimination in most private sector and State and local government employment. It requires access to non-federal governmental programs and prohibits discrimination against individuals with disabilities in public accommodations, most pertinently including the sale of insurance, and the furnishing of academic, professional, and trade courses and licensing.

7 Individualized Inquiry

A. THE PROBLEM

ADD which is both severe and well documented is a handicapping condition under the RA, IDEA, and most probably, the ADA. As a result, ADD individuals may not be discriminated against on the basis of their ADD and are entitled to reasonable accommodations. But what does that really mean? When is a restriction that bars an ADD individual justified? There are few clear answers for handicapped individuals generally, and none for ADD individuals.

However, the question is there and becoming daily more important for the ADD because there is a growing recognition that ADD -at least for some- is a life long condition. And so equal employment, as well as access to the professions, and to public accommodations will become every bit as important to the ADD as elementary education. It will provide a new battleground.

There are two major and (presently) unanswerable questions.

■ When is "the imposition or application of eligibility criteria" that restrict an ADD (or other disabled) individual's access to employment, education, public facilities, public services and the enjoyment of licensed activities "necessary for the provision" of those activities, and hence justified? See 42 U.S.C. § 12182(b)(2)(A)(i). When may an employer, for example, validly decline to employ someone who is ADD because he is ADD? When may a school employ a test which has the effect of failing ADD individuals in disproportionate numbers? May the government lawfully deny ADD adults access to licensed activities such as hunting, motor vehicle operation, and flying which are available to others?

■ What reasonable accommodations are mandated for ADD individuals in the context of employment, education, public facilities, public services and the enjoyment of licensed activities?

The answer lies in 1] the nature of the criterion and 2] individualized inquiry.

B. NATURE OF THE CRITERION

In general, ADD individuals individuals tend to perform less well than others on standardized tests. This can result in artificially lowered grades, an inability to graduate, depressed SAT scores, denial of job applications, and a refusal to promote ADD individuals.

Schools, employers, and licensing authorities may test to determine an individual's suitability for admission, licensing, the assessment of individual performance, and graduation. Testing is proper, even where it seeks to measure abilities in which a person with a disability is deficient. **Board of Education of Northport-East Northport Union Free School District v. Ambach**, 458 N.Y.S. 2d 680 (N.Y. App.1982), *cert. den.* 104 S.C. 1598 (1984) A student may, for example, be required to demonstrate his understanding of mathematics even if he has an arithmetic learning disorder.

However, testing which [1] does not measure intellectual functioning or accomplishment and which [1] causes handicapped persons to fail because of their handicaps violates the equal protection requirements of the 14th Amendment. A school district may not, for example, test a blind student's understanding of mathematics by requiring that he take the test in precisely the same manner as a sighted student. In **Brookhart v. Illinois State Board of Education**, 697 F. 2d 179 (7th Cir. 1983), the Court held that Illinois could impose a competency test for High School graduation, but that it had violated the IDEA by giving learning disabled students "only" a year and a half's notice that the test would be required.

Testing which relies on a single criterion is unlawful where that criterion can be shown to be an inaccurate predictor of performance. In **Sharif, ex rel. Salahuddin v. New York State Education Department**, 709 F. Supp. 345 (S.D. N.Y. 1989), the Court enjoined the New York State Education Department from relying solely on SAT scores in awarding state funded scholarships, on the grounds, among others, that the SATs discriminated against women in violation of the equal protection provi-

sions of the 14th Amendment. The Court found that the SAT was an inadequate "proxy" for high school achievement because females score significantly below males on the SAT while performing equally or better than males in high school. Similarly, the SAT's almost certainly discriminate against the learning disabled and those with ADD.

In **Riley v. Ambach**, 508 F. Supp. 1222 (E.D. N.Y. 1980), the Court held invalid a state regulation which provided that an individual would not be considered learning disabled unless there was a 50% disparity between expected intellectual ability and actual achievement. In so ruling, the Court held that the standard was objectionable because it was not an accurate measure of the extent of a learning disability, and because it was employed as the only criterion in making that determination.

Where does this leave us? A criterion which governs an individual's access to employment, education, public facilities, public services and the enjoyment of licensed activities is likely to be held "necessary" and therefore justifiable where [1] the criterion measures an attribute [2] the attribute is important for determining access to the service, or an individual's qualifications [3] the test employed accurately measures the attribute and [4] other methods of measurement are employed. In short, a disability claim is entitled to "individualized inquiry."

C. INDIVIDUALIZED INQUIRY

The future battleground is sharply illustrated by the case of **Ward v. Skinner**, 943 F.2d 157 (1st Cir. 1991) There, a truck driver was denied a license to drive a truck by the Department of Transportation (DOT). Although the driver had a history of epileptic seizures, he had not experienced one since 1984 and had driven without incident until May 1989 when his employer discovered his condition and suspended him. The driver showed that his seizures were controllable with anti-convulsant medication, and submitted convincing medical evidence (including expert testimony) that he was fit to drive. However, the DOT revoked his license on the basis of a regulation which prohibited the operation of a commercial motor vehicle by one who has an "established medical history or clinical diagnosis of epilepsy." The DOT refused to waive this regulation (though authorized to do so) based on a

DOT Medical Task Force recommendation that the rule be enforced unless an epileptic 1] had no seizures **and** 2] did not take anti-convulsant medication.

The driver brought suit under Section 504 of the RA. The United States Court of Appeals for the First Circuit held that the DOT denial was justified because 1] the DOT conducted an individualized inquiry into the driver's circumstances 2] the DOT based its ruling on the Task Force Report 3] the Task Force Report was reasonable 4] further evaluation of the driver's ability could not demonstrate a driving capability greater than he had already shown and 5] the DOT was in the process of re-evaluating its regulation to see if it could be liberalized.

The heart of the matter lay in the Task Force Report which the Court found to be reasonable. The Task Force concluded that, although diagnosed epileptic drivers, as a group, had low accident rates, their irregular work hours could lead to stress, irregular eating habits, and a sporadic lack of access to medical care. These factors, the Task Force found, alone, or if combined with a tendency to lose or forget one's medication, posed a driving risk which could only be met by a rule barring all epileptic drivers except those who had 1] had no seizures **and** 2] did not take anti-convulsant medication.

While **Ward v. Skinner** did not involve ADD, it is important to consider what the outcome might have been if it had. The same regulations which the DOT successfully invoked also provide that a license may be given only to one who (among other things):

> Has no mental ... or psychiatric disorder likely to interfere with his ability to drive a motor vehicle safely.... (49 CFR § 391.41(b)(9) (and)
>
> Does not use ... an amphetamine ... except that a driver may use such a substance or drug if the substance or drug is prescribed by a licensed medical practitioner who is familiar with the driver's medical history and assigned duties and who has advised the driver that the prescribed substance or

> drug will not adversely affect the driver's ability to safely operate a motor vehicle.... (49 CFR § 391.41(b)(12)

There is no question that ADD is considered a "behavior disorder" under DSM-III-R and therefore, a psychiatric condition under the regulations. Moreover, the inattention and impulsivity which are often characteristics of ADD are arguably conditions which may interfere with driving. Where the individual utilizes a prescription for Ritalin or Dexedrine, the regulations further require medical evidence that the use of these medications is safe. Moreover irregular work hours could lead to stress, irregular eating habits, and a sporadic lack of access to medical care as easily for an ADD individual as for one with epilepsy. Finally, these factors, alone, or if combined with a tendency to lose or forget one's medication, could be viewed as posing a driving risk. As a result, a diagnosed ADD individual might at least have to prove that he is entitled to a license under the **Ward v. Skinner** holding, and possibly he **could** be denied a license under the rationale of that case.

Results such as this arise because there can be legitimate job related requirements which will operate to bar disabled individuals. The RA (and the ADA which relies on its philosophy) do not prohibit proper and reasonable restrictions (often where safety is concerned). However, both acts do -in general- require that each person with a disability be accorded an individualized inquiry into his circumstances to ensure that any rule limiting his activities has a reasonable basis as applied to him. **School Board of Nassau County v. Airline**, 480 U.S. 273 (1987). However, while the RA does require an "individualized inquiry" the language of the RA is very general, and will not be interpreted to abolish prior detailed statutory restrictions. The courts reason that Congress implicitly approved such laws by enacting the RA (or ADA) without repealing them. **Traynor v. Turnage**, 485 U.S. 535 (1988).

Further, if an ADD individual lawfully can be denied a particular employment, course of education, or license, it should follow that an ADD applicant can be asked whether he or she has that disorder before being employed, educated or licensed. In those circumstances, an applicant is faced with the ethical and legal dilemma of whether to forgo the application, disclose the condition or represent that he or she does not have it.

The lesson of these cases is clear. An ADD person's right to pursue specific careers, courses of education, and licensed activities may have to be fought on a case by case basis in which the question will always be whether there is a valid reason to bar him or her because of the disorder. There are more questions than answers in this area because, until very recently, ADD has been considered a disorder which is limited to childhood. Now that adults are recognized as having ADD, the questions have become urgent.

D. REASONABLE ACCOMMODATION

An ADD individual may nonetheless be entitled to reasonable accommodation of his disability, if that can be done without "undue burden". However, if exclusion is justified following an analysis of the criterion and an appropriate individualized inquiry, it is unlikely that a reasonable accommodation will be required. At present, there is no guidance on the question of which accommodations might be reasonable for an ADD individual. However, our best judgement is that accommodations which provide the additional time and structure contemplated by the Department of Education in the Memorandum of the Office of Special Projects and Rehabilitative Services, Department of Education, dated 16 September 1991 will be required.

E. SUMMARY

An ADD individual whose condition is sufficiently severe and documented may not be denied access to employment, education, public facilities, public services and the enjoyment of licensed activities unless 1] the criterion which excludes him is "necessary" 2] he is afforded an "individualized inquiry" into his particular circumstances and 3] reasonable accommodations cannot be made.

A criterion which governs an individual's access to employment, education, public facilities, public services and the enjoyment of licensed activities is likely to be held "necessary" and therefore justifiable where [1] the criterion measures an attribute [2] the attribute is important for determining access to the service, or an individual's qualifications [3] the test employed accurately measures the attribute and [4] other methods of measurement are employed. And, although a disability

claim is entitled to "individualized inquiry" and reasonable accommodations are required, the very inattention, impulsivity, and hyperactivity which characterize ADD, under certain circumstances may justify the exclusion of ADD individuals.

8 State Law Remedies

So far we have dealt with Federal law, because it has been most influential in assisting the handicapped. However, State constitutional and statutory laws have evolved following Federal leadership, and in some cases have surpassed the Federal models on which they were based in the rights that are extended to the handicapped. For example, Massachusetts and North Carolina have taken the position that development of the individual is so important that all students must have an equal opportunity to maximize their educational achievements. See generally, **Roland M. v. The Concord School Committee**, 910 F.2d 983 (1st Cir. 1990) *cert. den.* 111 S.C. 1122 (1991) for an excellent discussion of this topic. The case contains a concise discussion of the IDEA as does **Burlington School Committee v. Massachusetts Department of Education**, 471 U.S. 359 (1985). These States impose a higher standard than that required by **Board of Education of Hendrick Hudson Central School District v. Rowley**, 458 U.S. 176 (1982). In addition, State law may supplement or fill in the gaps where Federal law is silent. The question of whether State law has been "pre-empted" by Federal law is a complex question which must be considered on a case by case basis, and is beyond the scope of this book. Finally, State law has addressed ADD in a variety of contexts such as family law, criminal law, and workmen's compensation. Those topics are addressed in Chapter 11.

9 The Social Security Act

The Social Security Act (42 U.S.C. § 402 et seq.) provides in Titles II and XVI, for the payment of a supplemental security income to disabled persons. The disabilities covered include attention deficit hyperactivity disorder. 20 CFR § 404, Subpart P, App. 1, ¶ 112.11 lists Attention Deficit Hyperactivity Disorders and defines them as follows:

> *Attention Deficit Hyperactivity Disorder:* Manifested by developmentally inappropriate degrees of inattention, impulsiveness, and hyperactivity.
>
> The required level of severity for these disorders is met when the requirements in both A and B are satisfied.
>
> A. Medically documented findings of all three of the following:
>
> 1. Marked inattention; and
>
> 2. Marked impulsiveness; and
>
> 3. Marked hyperactivity.
>
> AND
>
> B. For older infants and toddlers (age 1 to the attainment of age 3), resulting in at least one of the appropriate age-group criteria in paragraph B1 of 112.02; or, for children (age 3 to attainment of age 8), resulting in at least two of the appropriate age-group criteria in paragraph B2 of 112.02.

The first ("A") part of this definition is based on, but is somewhat narrower than the DSM-III-R definition discussed in Chapter One, while the second ("B") part of this definition is the Social Security Administration's own language, and is broader than that of the DSM.-III-R. Note that only the ¶ A criteria apply when the individual is over the age of 8. For younger children, the restrictions of ¶ B apply. For children between 1 and 3, the ADD must be accompanied by an impairment in [1] a "gross or fine motor development" [2] "cognitive/ communicative function" or [3] "social function" at a "level generally acquired by children no more than one-half the child's chronological age." 20 CFR § 404, Subpart P, App. 1, ¶ 112.02 (B)(1). Where the child is functioning at 2/3 of its chronological age in two of these areas, the ADD is also sufficiently severe to qualify.

For children between 3 and 8, the ADD must be accompanied by [1] a "marked impairment in age-appropriate cognitive/communicative function" or [2] a "marked impairment in age-appropriate social functioning." 20 CFR § 404, Subpart P, App. 1, ¶ 112.02 (B)(2).

The existence and severity of the ADD must be demonstrated by medical evidence, and, where appropriate, standardized psychological testing. 20 CFR § 404, Subpart P, App. 1, ¶ 112.00(D). In judging the severity of the disorder, the effect of medications must be considered. When medication controls the "primary manifestations" of the disorder, "particular attention must be focused on the functional limitations which may persist." When they occur, "[t]hese functional limitations must be considered in assessing impairment severity." 20 CFR § 404, Subpart P, App. 1, ¶ 112.00(F).

Even before ADD was added to the SSI regulations, the courts had begun to include it. In **Trostel ex rel. Murray v. Bowen**, 695 F. Supp. 1418 (E. D. N.Y. 1988) the Court held that ADHD (on the facts of the case presented) was a documented neurological disorder under the SSI regulations as they then stood and concluded that the plaintiff was entitled to benefits. The Court added that:

> This conclusion appears to be in line with current thinking about attention deficit disorder. The court takes judicial no-

> tice of a treatise cited by plaintiff stating that 'it is believed that [attention deficit disorder] is the result of a brain dysfunction, not emotional conflict.' Brunstetter & Silver, Attention Deficit Disorder, in Comprehensive Textbook of Psychiatry IV 1684 (H. Kaplan & B. Sadock eds; 4th ed. 1985). 695 F. Supp. 1418 at 1420

The Court appears to have viewed accompanying neurological signs as evidence that ADD is neurologically based.

And in **Aviles v. Bowen**, 715 F. Supp. 509 (S.D. N.Y. 1989) the Court held that ADD was a functional nonpsychotic disorder with anxiety, depression and oppositional behavior under the SSI regulations as they then stood and that a person with this disorder is entitled to payments.

It must be remembered that the purpose of SSI is to provide income for those who cannot earn it. The degree of handicap necessary to qualify for SSI must be such that the person is not employable, even when assisted by appropriate medication. In contrast, the RA and ADA prohibit discrimination against one who has a handicap which :substantially limits one or more of such person's major life activities" and the IDEA provides educational assistance for "children with ... specific learning disabilities ... who, by reason thereof need special education and related services...." 20 U.S.C. § 1401(a)(1).

10 The Selective Service Act

A. THE SELECTIVE SERVICE ACT AND REGULATIONS

At present there is no military draft, and none appears imminent. However, at some time it may be necessary to revive the draft. And this may pose a problem for the ADD individual. Today, handicapped individuals are being "mainstreamed" into society. They cannot lawfully be denied employment, education, jobs and housing. As a result, both their rights and their responsibilities have increased. And that may include the obligation to serve in the military or alternative national service.

The analysis which follows is based on current regulations which apply at a time when there is no draft. The standards may be altered in the future. However, it is probable that the applicable regulations will be liberalized to permit a wider draft rather than restricted to require a smaller one.

The Selective Service Act, 50 App. U.S.C. § 456(h) provides that the President may defer the military service of "persons found to be physically, mentally, or morally deficient or defective." That statutory provision is implemented by the Secretary of Defense under 32 CFR § 1630.44 which creates a "4-F" classification of persons not acceptable for military service, thus:

> **§ 1630.44 Class 4-F: Registrant not acceptable for military service.**
>
> In Class 4-F shall be placed any registrant who is found by the Secretary of Defense, under applicable physical, mental or administrative standards, to be not acceptable for service in the Armed Forces; except that no such registrant whose

> further examination or re-examination is determined by the Secretary of Defense to be justified shall be placed in Class 4-F until such further examination has been accomplished and such registrant continues to be found not acceptable for military service.

The applicable physical, mental, and administrative standards are those set by the Surgeon General of the Army under Army Regulation (AR) ¶ 40-501.

B. ARMY REGULATION (AR) ¶ 40-501

Army Regulation (AR) ¶ 40-501 implements DOD Directive 6130.3 "Physical Standards for Enlistment, Appointment, and Induction," 31 March 1986. AR ¶ 2-2(g) provides that it applies to "All individuals being inducted into the Army."

1. Medical Acceptability

Medical examiners are required to report as "medically unacceptable" all "individuals who possess any one or more of the medical conditions or physical defects listed in this regulation as a cause for rejection...." AR ¶ 1-5(b) These standards "cannot be waived by medical examiners or by the examinee."AR ¶ 1-6(a) Conversely, those who meet the standards must be reported as "medically acceptable."AR ¶ 1-5(a). The regulation further provides:

> No individual will be accepted on a provisional basis subject to the successful treatment or correction of a disqualifying defect. AR ¶ 1-5(a)

2. Behavior Disorders

Behavior disorders can be disqualifying. AR ¶¶ 2-33(a)-(b) provides:

> The causes for rejection for appointment, enlistment, and induction are __

a. Personality or behavior disorders, as evidenced by frequent encounters with law enforcement agencies, antisocial attitudes or behavior which, while not sufficient cause for administrative rejection, are tangible evidence of impaired characterological capacity to adapt to military service;

b. Personality or behavior disorders where it is evident by history, interview, or psychological testing that the degree of immaturity, instability, personality inadequacy, impulsiveness or dependency will seriously interfere with adjustment in the Army as demonstrated by repeated inability to maintain reasonable adjustment in school, with employers and fellow workers, and other social groups....

3. Academic Skills Disorders

Academic skills disorders are covered by AR ¶¶ 2-33(d):

d. Specific academic skills disorders secondary to organic or functional mental disorders sufficient to impair capacity to read and understand at a level acceptable to perform military duties..."

4. Psychiatric Examination

Psychiatric examinations are covered by AR ¶10-21:

a. During the psychiatric interview, the examining physician must evaluate each individual sufficiently to eliminate those with symptoms of a degree that would impair their effective performance of duty.

b. The psychiatric interview will be conducted subsequent to the completion of all items on SF 88 and 93 (medical history forms). During the interview, the examinee's behavior will be

observed and an estimate made of his or her current mental status. Any evidence of disorganized or unclear thinking, of unusual thought control, of undue suspiciousness, or of apathy or 'strangeness' will be noted. Any unusual emotional expression, such as depression, expansiveness, withdrawal or marked anxiety, which is out of keeping with the content of the interview will be carefully evaluated.

c. The results of the psychiatric examination will be recorded on SF 88, item 42, as normal or abnormal in the space provided. If the individual is disqualified, the defect will also be recorded in item 74, SF 88.

Note: Diagnostic concepts and terms used in paragraph 10-21 are in consonance with the DSM-III-R Manual, American Psychiatric Association, 1987. The minimum psychiatric evaluation will include Axis I, II, and III. (Emphasis in the original.)

Note that the DSM-III-R must be followed.

5. Neurological Impairments

Persons with neurological impairments are also not qualified. AR ¶ 2-29(j) lists "intellectual deficit, disturbances of consciousness, or personality abnormalities regardless of cause" as ground for a finding of medical unacceptability "if there is any indication that such involvement is likely to interfere with prolonged normal function in any practical manner or is progressive or recurrent."

6. Impact on Military Duties

It is clear from the foregoing that ADD, coupled with learning disabilities, is not *per se* a disqualifying condition. Together, they must be of sufficient severity to impede the performance of routine entry level military duties. Nor does the fact of

medication by itself, defer an ADD person since Ritalin may sufficiently reduce the severity of the condition.

In this regard, the example of narcolepsy is instructive. AR ¶ 2-29(h) lists narcolepsy as a medically disqualifying condition for inductees. However, AR ¶ 6-26(c) which applies in a general mobilization, lowers the standards for narcoleptics and lists narcolepsy as disqualifying only "when attacks are not controlled by medication." The medication is of course most often Ritalin. It therefore appears that the use of Ritalin alone will not by itself entitle one to a deferment.

C. PROCEDURE

A claim of exemption should be made at the time of initial classification. It should be supported by appropriate affidavits. 32 CFR §§ 1633.2 and 1633.4. The Selective Service System's finding that a registrant is qualified for induction will be upheld if it has a "basis in fact". **Laino v. Secretary of Defense**, 292 F. Supp. 252 (S. Cal.1968) However, the Selective Service System is obligated to reopen the record, when, prior to induction, a registrant produces evidence amounting to a *prima facie* case that he is entitled to be reclassified. **United States ex. rel. Miller v. Eberhardt**, 324 F. Supp. 961, (N.D. Ga. 1971)

In **U.S. v. Coleman**, 478 F.2d 1371, (9th. Cir. 1973), the 9th Circuit held unlawful an induction order where the record clearly showed that [1] registrant was suffering from debilitating migraine headaches and [2] there was no affirmative evidence that medication would correct the condition. The Court held that a registrant must be fit for service. A provisional acceptance subject to later correction is unlawful under AR 40-501. However, if medication can render the registrant **fully** fit for service, induction is appropriate. See also **Laino v. Secretary of Defense**, 292 F. Supp. 252 (S. Cal.1968).

A registrant who has been classified 1-A and whose classification has been upheld may still be disqualified by the medical examiner at the Induction Center. **Laino v. Secretary of Defense**, 292 F. Supp. 252 (S. Cal.1968)

Only one case has addressed learning disabilities and ADD. **U. S. v. Coale**, 507 F.2d 1313 (9th Cir. 1974) Evidence, consisting of two letters which showed Coale as psychoneurotic with phobias and learning disabilities and as suffering from a hyperkinetic syndrome with psychological deficiencies which prevented him from performing normally in school was not on the record a *prima facie* disqualifying mental condition which required reopening of his record and excused his failure to report for induction into the armed forces in violation of 50 U.S.C. App. § 462(a).

A registrant may raise his claim [1] at the time of initial classification and [2] at the time of a request for reclassification based on a *prima facie* case of entitlement, provided that the matter is raised before induction. When timely asserted, a claim can be pursued at a trial for refusal to be inducted and on habeas corpus. It is unclear how long the claim assertion can be delayed. However, the only practical choice is to [1] prepare a current diagnosis [2] support it with relevant affidavits and [3] assert it at every stage.

There has been little litigation of medical exemption and deferment cases. It appears that a letter requesting deferment, coupled with two relevant opinions of doctors, will, if unopposed, establish a *prima facie* case. **United States ex. rel. Miller v. Eberhardt**, 324 F. Supp. 961, (N.D. Ga. 1971)

D. SUMMARY

To establish that an ADD individual is entitled to a deferment, you must show that [1] he has a behavior, learning or neurological disorder [2] the disorder exists at the time of induction [3] the disorder will seriously interfere with the performance of entry level military duties and [4] medication will not adequately correct this defect. The claim of deferment should be based on a current diagnosis which is supported with relevant affidavits and should be asserted at every stage of the classification and induction process.

11 ADD In Court

An individual's mental, physical and emotional health can be material to the outcome of a civil or criminal proceeding in countless ways. ADD is one of those conditions and, with its growing recognition, evidence concerning it is beginning to be used in court. Accordingly, we have surveyed all reported state and Federal court cases. What follows are capsule summaries of cases which have in one way or another involved ADD. This survey is intended to be informative, but it is **not**, repeat **not**, a substitute for sound legal advice. It is a jumping off point for you and your lawyer which we thought might be helpful.

Before discussing these cases three observations are in order. First, the cases have in common that ADD was considered by the Court. That is not to say that ADD was the only factor, or even the predominant factor considered. Second, most of the ADD individuals in these cases were diagnosed as having other problems as well. These included learning disabilities, mild mental retardation, conduct disorder, and substance abuse. In some cases. opinions were divided as to the nature of the disorder in question. In one case, the professional opinions included paranoid schizoid reactions, intermittent explosive disorder, borderline personality disorder, alcoholism, and minimal brain dysfunction as well as ADHD. See **State v. Juinta**, 224 N.J. Super. 711; 541 A.2d 284 (1988) Third, and finally, the quality of the opinions varied from ones formed on the basis of brief interviews to others which were exhaustively documented and persuasively supported. Despite these shortcomings, it is our opinion that the survey is useful because these cases contribute heavily to the articulation of the rights of ADD individuals.

A. FAMILY LAW

Family law is that body of legal rules (both statutory and court made) which governs the family. It includes marriage, divorce, and child rearing. As you know, ADD has a strong impact on family living, and that is reflecting itself in the case law.

1. Parental Duties

Parents have a legal duty to provide treatment for ADD as part of their general obligation to provide medical care for their children.

In The Matter of Juvenile Action No. JD-500325, 163 Ariz. 455; 788 P.2d 1206 (Ct. App. 1989)

2. Child Support

ADD frequently requires special tutoring, counseling, and medication. The cost of this care is a factor which can be considered in establishing or modifying the amount to be paid as child support in a divorce proceeding.

Earheart v. Mann, 545 So. 2d 85; 1989 (Ala. Civ. App. 1989)

In re the Marriage of Diana Jo Larsen, 805 P.2d 1195 (Colo. App. 1991)

Weil v. Weil, 299 S.C. 84; 382 S.E.2d 471 (Ct. App. 1989)

The obligation to make child support payments may, but need not, end when the child is 18. In **Pitts v. Pitts**, 566 So. 2d 12 (Fla. App. 1990) the Court considered the therapy, medication, tutorial, and transportation costs incurred because of an ADD child in fixing the amount and duration of the child support obligation. The Court extended the support obligation until graduation from High School which was substantially later than the child's 18th birthday because of educational delays attributable to ADD.

3. Custody

The Courts have had frequent occasion to consider ADD in deciding whether **one** natural parent, or **neither** natural parent, should be allowed custody of a minor child. These cases generally divide themselves into divorce cases and child neglect cases.

a. Divorce

Contested custody cases involve extensive evaluations of the child's interests, and the parents' ability to serve them. Most of the cases have involved the **child's** ADD. However, in one case, the Court considered the **father's** ADD in deciding whether his custody of the child would substantially impair its physical, mental, or emotional health. See **In The Interest Of I.T. v. Department of Health & Rehabilitative Services**, 532 So. 2d 1085 (Fla. App. 1988).

One case of interest is **In re the Marriage Of Donald K. Eldert**, 511 N.E.2d 945 (Ill. App. 1987) in which the Court found that ADD which manifested itself when the child attended Kindergarten was a changed circumstance which justified revoking the mother's custody award and permitted an award of custody to the father. The mother was found to be less able than the father to cope with the financial and psychological demands of the child's ADD.

And in **Applegate v. Applegate**, 236 Neb. 418; 461 N.W.2d 419 (1990) a custody award to the father was upheld despite a showing that both parents overreacted physically to the frustrating behavior of their ADD children. Note that there is some suggestion in the case that a more extreme overreaction might constitute child abuse.

Moon v. Moon, 790 P.2d 52 (Utah App. 1990) held that a father who taught his ADD son to work with his hands, and sought to reinforce his self-confidence and instill a love of nature in his son was awarded custody in preference to the mother who sought to assist him with homework. The Court stressed that both parents were suitable.

See also: **James M. v. Maynard**, 408 S.E.2d 400 (W. Va.1991)

b. Neglect

In re Elizabeth M., 283 Cal. Rptr. 483 (Ct. App. 1991)

In re Victoria M., 255 Cal. Rptr. 498 (Ct. App. 1989)

In re Christie D., 253 Cal. Rptr. 619 (Ct. App. 1988)

In The Interest Of S.J., 451 N.W.2d 827 (Ia. 1990)

In re Merton R., 545 A.2d 650 (Me. 1988)

In Re Beverly B., 72 Md. App. 433; 530 A.2d 766 (1987)

In the Matter of Chrystal L. Campbell, 170 Mich. App. 243; 428 N.W.2d 347 (Ct. App. 1988)

In the Matter of the Welfare of J.L.L., 396 N.W.2d 647 (Minn. App. 1986)

In the Matter of J.L.S., 234 Mont. 201; 761 P.2d 838 (1988)

In the Matter of Nathaniel T., 501 N.Y.S.2d 647 (Ct. App. 1986)

In the Matter of Linda E., 533 N.Y.S.2d 542 (Ct. App.1988)

B. HEALTH AND WELFARE

ADD individuals may be entitled to services under state statutes. In **Mullins v. Department of Human Services**, 454 N.W.2d 732 (N.D. 1990) ADD individuals were held to be developmentally disabled persons entitled to social services under statutory language similar to that used in Federal statutes and regulations. In reaching this result, the Court disregarded an administrative manual employed by the state agency which, while it purported to provide administrative guidance, in fact narrowed the class of potential recipients.

C. WORKMEN'S COMPENSATION

Workmen's compensation statutes were originally enacted to provide a simple and inexpensive means of compensating workers for on-the-job injuries. Many of these statutes now cover occupation related diseases as well, and under a liberal interpretation, can extend to some aspects of ADD.

In the Matter of McGarrah, 296 Ore. 145; 675 P.2d 159 (1989) held that a psychiatric disability whose major contributing cause (but not the sole cause) was workplace stress, was a compensable occupational disease under the state workmen's compensation statute. The Court reasoned that, had the legislature intended to exclude DSM-III-R mental disorders from statutory coverage, it could have done so. **Significantly, the Court listed ADD as one of the disorders which the legislature could have excluded but did not!** Thus, it appears that, where ADD is aggravated by work stress, or where ADD and work stress together produce another disorder such as depression or substance abuse, a workmen's compensation award may be proper.

D. CRIMINAL LAW

It is a sad fact that ADD individuals are more prone to have problems with the criminal law. Some studies suggest that ADD individuals are not significantly more likely to violate the law but are more likely to be arrested, indicted and convicted for their violations. Violations are most often minor, e.g. traffic offenses. Some ADD individuals appear to have difficulty with rules that are not absolutely definite and

unvarying. It may be that the tendency in these individuals to be oppositional to rules that appear arbitrary and varying, e.g. speed limits, and to react poorly to personal authority may exacerbate their legal problems. We will discuss some serious cases. These are by no means typical. It should be stressed that, in many of the cases, ADD was found to exist together with other conditions such as learning disabilities, mild mental retardation, conduct disorder, anti-social personality disorder and substance abuse. In addition, the opinions often do not indicate whether the DSM-III-R definition of "ADD" or some less precise definition was used. Accordingly, they are not necessarily "pure" ADD cases.

The presence of conduct disorder or anti-social personality disorder would render the possible presence of ADD, however defined, of lesser significance. Conduct disorder, under DSM-III-R is a personality disorder (as distinct from a behavior disorder such as ADD) which involves a pattern of violation of the basic rights of others and major rules (e.g. initiating aggression, physical cruelty, lack of feelings) combined with a history of conduct disorder (also a personality disorder) before age 15. These personality disorders might, on occasion, co-exist with ADD or even be confused with it. Confusion might occur if one's professional opinion is formed on the basis of a brief interview rather than a thorough methodology including an examination of personal history and the DSM-III-R criteria.

1. Culpability

ADD alone is not a mental illness which excuses criminal conduct. **Wainwright v. State**, 302 Ark. 371; 790 S.W.2d 420 (1990) *cert. den.* 111 S.C. 1123 (1991) However, in **State v. Werlein**, 136 Wis. 2d 445; 401 N.W.2d 848 (1986) the Court held suggested that, when combined with other mental health problems, it might be. In that case, the defendant sought to introduce testimony that he suffered from a mental disease or defect sufficient to justify a finding of not guilty. The mental disorder in question was an anti-social personality disorder which was said to have resulted from childhood "attention deficits". The trial court excluded the testimony and was reversed on appeal, the appellate court holding that the testimony should be presented to the jury for a determination whether the defendant was not guilty by reason of a mental disease or defect. A new trial was ordered. (Note: the statute in question excused criminal conduct resulting from a mental

disease or defect. Other states use different tests for determining whether a defendant is criminally responsible.)

As noted above, ADD alone was not involved. ADD may, however, be a factor which will lessen the severity of the offense. For example, a crime requiring proof of intent might be reduced to one requiring reckless behavior, or one of reckless behavior reduced to one requiring a showing of negligence.

Griffin v. State, 794 S.W.2d 659 (Mo. 1990) *cert. den.* 111 S.C. 2911 (1991)

State v. Juinta, 224 N.J. Super. 711; 541 A.2d 284 (1988)

2. Sentencing

ADD is a factor which may lessen the sentence to be imposed. (See **Wainwright v. State**, 302 Ark. 371; 790 S.W.2d 420 (1990) *cert. den.* 111 S.C. 1123 (1991) in which a psychologist testified that an ADD individual would benefit from prison structure as opposed to the death penalty.)

People v. Taylor, 52 Cal. 3d 719; 801 P.2d 1142 (1990)

People v. Kelly, 51 Cal. 3d 931; 800 P.2d 516 (1990)

People v. Malone, 47 Cal. 3d 1; 762 P.2d 1249 (Cal.1988) *cert. den.* 490 U.S. 1095 (1989)

McKinney v. State, 579 So. 2d 80 (Fla. 1991)

State v. Kysar, 116 Idaho 992; 783 P.2d 859 (1989)

State v. Middleton, 295 S.C. 318; 368 S.E.2d 457 (1988) *cert. den.* 488 U.S. 871 (1988)

ADD may also mitigate the severity of other punishments than sentences under the criminal law. ADD which was treatable by medication was considered a mitigating factor in attorney disciplinary proceedings which resulted from an attorney's misuse of client funds. A one year suspension from the practice of law was ordered. See **In the Matter of Scibetta**, 502 N.Y.S.2d 565 (Ct. App.1986)

3. Procedure

a. Pre-Trial Interrogation

Under the Supreme Court's ruling in **Miranda v. Arizona** 384 U.S. 436 (1966), Police and Prosecutors are required by the 5th and - in appropriate cases - the 14th Amendments to the Constitution to warn individuals suspected of crimes concerning their constitutional rights before interrogating them. These warnings that the individual has the right to remain silent and the right to counsel before answering are by now familiar to every TV and movie viewer. However, they may be less than adequate when given to an ADD individual.

ADD may be considered as a factor in determining whether the defendant understood his **Miranda** warning and therefore whether it was constitutionally adequate. In **Segerstrom v. State**, 301 Ark. 314; 783 S.W. 2d 847 (1990) the Court held that a Police interrogation of a suspect with ADD which employed a simple explanation of the suspect's rights and was followed by slow questioning immediately thereafter was constitutionally proper. The case of course, suggests that Miranda warnings and subsequent Police interrogations which are not suitably tailored to an ADD suspect will violate the 5th and - in appropriate cases - the 14th Amendments to the Constitution. However, once the Police have conducted a proper interrogation, any statements made by the accused will be admissible. In **United States v. Dzialo**, 773 F. Supp. 21; (E.D. Mich. 1991) the Court held that pre-trial statements made by a defendant with Tourette's Syndrome were not involuntary and therefore inadmissible even if the Tourette's Syndrome (which the Court noted is often accompanied by ADD and hyperactivity) impaired the defendant's cognitive and volitional processes unless the statements were coerced by some police misconduct.

b. Capacity To Stand Trial

ADD has been considered in determining whether a person is mentally competent to stand trial. Generally, a person is competent to stand trial if he is able to 1] understand the nature of the charges against him, including the conduct which he has allegedly engaged in, 2] understand the possible penalties and 3] assist counsel in his own defense. Most ADD individuals will meet these very basic tests.

State v. Shields, 593 A.2d 986 (Del. Super. 1990)

In Re: K.S.J., 258 Ga. 52; 365 S.E.2d 820 (1988)

State v. Young, 780 P.2d 1233 (Utah 1989)

c. Capacity To Testify

The impact of court procedures on an ADD individual may be uniquely stressful. In **Gore v. State**, 573 So. 2d 87; (Fla. App. 1991) the Court considered whether it was an abuse of discretion for a trial court to permit videotaped news coverage of a trial of an ADD individual where, it was alleged, the circumstances might "cause him to want to perform before the cameras". The videotaping was ultimately allowed after some attempts -such as requiring a less intrusive use of cameras- to accommodate the defendant. The Court held that, despite the possibility of distractions, the defendant was competent to testify. (Note: the question whether a witness is competent to testify is by no means confined to criminal cases. The question can arise in the context of civil litigation as well.)

d. Credibility

ADD has become a factor in deciding whether a witness' testimony is credible. Challenges to ADD witnesses have largely been confined to ADD children whose testimony is essential to the prove of child abuse, including sexual abuse. In **People v. Hickox**, 553 N.E.2d 1166 (Ill. App. 1990) *cert. den.* 561 N.E. 2d 700 (1990) an appellate Court sustained a conviction on sexual abuse charges based on

an ADD child's testimony, noting testimony to the effect that "lying is not a symptom of the disorder".

Most states do not permit psychiatric testimony concerning the mental state of witness (including the effects of ADD) which is offered for the purpose of evaluating a witness' credibility. However, some do. See **State v. Halstead**, 362 N.W.2d 504 (Ia. 1985) which held that the trial court has discretion to admit such testimony. (Note: the question whether a witness has testified credibly is by no means confined to criminal cases. The question can arise in the context of civil litigation as well.)

e. Appeal

ADD does not, of itself excuse a failure to file a timely appeal. **Stanley v. Lockhart**, 941 F.2d 707 (8th Cir. 1991)

f. Juvenile Offenses

Courts frequently must make difficult decisions concerning whether an individual should be tried as a juvenile or an adult. ADD has been considered as a factor in making this decision.

In Re: K.S.J., 258 Ga. 52; 365 S.E.2d 820 (1988)

The ability to consent to sexual intercourse of a 17 year old girl with ADD and other handicaps was considered by the Court in **State, In The Interest Of B.G.**, 247 N.J. Super. 403; 589 A.2d 637 (1991) when deciding whether her sexual attackers should be tried as adults or as juveniles.

Testimony that an individual is ADD can have negative consequences. In **State In the Interest of Clatterbuck**, 700 P.2d 1076 (Utah 1985) a determination to try a juvenile as an adult was held to have been properly based in part on expert testimony to the effect that the adult prison system was more likely than the juvenile system to meet the long term mental health needs of an ADD individual. *Accord* : **In the Interest of J.A.L.**, 162 Wis. 2d 940; 471 N.W.2d 493 (1991)

E. CIVIL LITIGATION

The courts have had little occasion to consider ADD in the context of civil litigation. However, the courts have been called on to decide whether ADD symptoms were an inherited trait or the result of an auto accident. **Bush v. Winn Dixie Of Louisiana, Inc.**, 573 So. 2d 508 (La. App. 1990)

F. EDUCATION AND EMPLOYMENT

The courts have had little occasion to consider ADD in the context of education and employment independent of the Federal laws we have been considering. However, the courts have been called on to decide cases which bear on these questions as they arise under state law.

In **Rich v. Kentucky Country Day, Inc.**, 793 S.W.2d 832 (Ky. App. 1990) a private High School enrolled an ADD adolescent in Grade 10 on probation, but refused to enroll him in Grade 11 because of poor academic performance. The court held that the school's refusal to enroll him for grade 11 was not a breach of contract because enrollment was done in a series on annual contracts, and not a tortious wrong because the state did not recognize the tort of educational malpractice. Finally, the court held that the sarcastic notes and comments used by teachers in evaluating his academic performance were not defamatory.

In **Ross v. University of Minnesota**, 439 N.W.2d 28; (Minn. 1989) an ADD individual was a second year student in the University's psychiatric residency program. He received negative evaluations based on his (a) failure to prioritize task assignments (b) lack of organization in his work (c) slowness in completing assignments (d) inability to handle a variety of tasks simultaneously and (e) poor interviewing skills. The use of Ritalin did not prove sufficiently helpful. At the same time, he conducted research and proposed a unique treatment for tardive dyskenesia which was published in a medical journal. Nonetheless, he was not allowed to continue with his third year of residency. His dismissal was without prejudice to his reinstatement when his social skills and clinical work improved or when he made greater progress on his clinical research work. The court held that he was not an employee of the University and his dismissal was not a breach of an employment

contract and dismissed his suit. Apparently, he did not make an argument based on civil rights statutes or constitutional provisions tactics which might have proved helpful then, and certainly would be more productive now with the passage of the Americans with Disabilities Act.

And in **Miller v. Beaugrand**, 564 N.Y.S.2d 390 (Ct. App. 1991) the court held that ADD caused by ingesting lead based paint over a period of six months was an injury caused by the defendant and supported a jury award.

G. SUMMARY

ADD can become a legal issue wherever an individual's mental, physical and emotional health is material to the outcome of a civil or criminal proceeding. In addition to the major statutes and programs considered, a substantial number of cases have considered ADD in other contexts. To date, the major additional areas have been 1] family law which has recognized the duty of parents to provide medical, financial and emotional support to ADD children 2] health and welfare law which has considered whether ADD individuals should be protected by health and welfare legislation and 3] criminal law, which has considered ADD in deciding whether defendants had a diminished capacity to commit a crime, and whether a lesser sentence should be imposed.

12 | Parent Advocacy

Legal rights do not exist in a vacuum. They must be asserted. And to accomplish this, you must become an advocate for your child, and as he grows, he must be taught to become an advocate for himself. No single chapter in a book designed to survey legal rights can do justice to the complex question of how best to advocate for your child, but there are a number of basic points which must be made.

■ Diagnoses. If you believe your child may be ADD, obtain a diagnosis from a medical professional who is familiar with ADD.

■ Evaluation. Have your child tested by professionals: educational diagnosticians, neuropsychologists, neurologists and/or psychiatrists.

■ Inform yourself. Understand ADD. Understand the the basics of educational testing, both as performed by your child's school and by your "experts."

■ Prepare a File. Update diagnoses and evaluations periodically. Be sure that they are in writing and that the file contains current information when changing schools, applying for benefits, etc. Be sure that your "experts" are current on your child's development and are available to attend school meetings with you as needed.

■ Decide on the best educational approach for your child on the basis of advice from your "team" of experts, and the recommendations of school and other officials. Insist on it.

■ Educate those who deal with your child. Sometimes teachers, school administrators, and counselors are not really familiar with ADD. It is also unfortunately the case that many ADD children frustrate those who deal with them! As a result, the ADD child is simply considered "bad", and the product of poor parenting rather than an individual whose handicap requires a special approach. Education can help.

■ Don't forget your neighbors. They are among the people who will have contact with your child and may need education about the disorder. It is also unfortunately the case that an ADD child will have relatively poor social abilities and may become a scapegoat or target for neighborhood children. Some of this is inevitable. But it can quickly come to be harmful. It may then be necessary to contact parents and urge them to work with you in the interest of all concerned.

■ Legal Advice. This brings us to another point. Legal counsel is not necessary for most of the actions you will need to take, but it may be necessary on occasion. The most common reasons are [1] threats by the school system to expel your child [2] the school's refusal to adopt an acceptable IEP and [3] community insensitivity. Retaining a lawyer should not be your first option, but it should be considered where appropriate.

■ Plan a Strategy For Asserting Your Rights. ADD is a diagnosis which is based primarily on behavior. Today no one knows the precise cause of ADD, and because no one does, there is a wide range of opinion as to the "cause" of your child's ADD behavior though the odds on favorite is that the immediate cause of attention deficit disorder lies in the brain's inability to process glucose at sufficient rates. Nonetheless, there still are some professionals who believe that ADD is "psychological" -i.e. that it is caused by environmental factors such as poor parenting or insufficiently severe punishments. The "psychological" view could have negative practical consequences. It is a fact that the laws we have been considering are clearly oriented to the assistance of those with traditional physical and neurological deficits (as well as major mental illnesses). ADD is more clearly to be accommodated if it can be shown to be neurologically based than if it is not.

So don't be surprised if your claim is met with an "expert" opinion that ADD is "really" the result of poor parenting, a recent divorce, or merely a symptom of a much more serious disorder such as mental retardation, conduct disorder, anti-social personality disorder, or schizophrenia. Mental health professionals could look at the same case and reach diverse conclusions, depending upon their training, experience, methods and thoroughness.

Remember **Trostel ex rel. Murray v. Bowen**, 695 F. Supp. 1418 (E. D. N.Y. 1988) which we discussed in Chapter 9? There, the Court held that ADHD (on the facts of the case presented) was a documented neurological disorder under the SSI regulations as they then stood and concluded that the plaintiff was entitled to benefits. The Court added that:

> This conclusion appears to be in line with current thinking about attention deficit disorder. The court takes judicial notice of a treatise cited by plaintiff stating that 'it is believed that [attention deficit disorder] is the result of a brain dysfunction, not emotional conflict.' Brunstetter & Silver, Attention Deficit Disorder, in Comprehensive Textbook of Psychiatry IV 1684 (H. Kaplan & B. Sadock eds; 4th ed. 1985). 695 F. Supp. 1418 at 1420

However, ADD may exist together with other handicaps - e.g. "standard" learning disabilities such as dyslexia. Often you may be faced with a choice as to which of these to emphasize. In general, you should find that resistance to accepting an ADD diagnosis is substantially reduced if there is also present a "standard" disability. Or you may choose to argue that some of these -slight neurological deficits for example- are evidence that ADD is neurological in origin.

There continues to be considerable misunderstanding about the cause of ADD. Yet, countless parents, teachers, governmental officials, police and judges are involved in the process of applying the laws to those who are handicapped by this disorder. Working with the law (particularly in an area as controversial and unclear as this one) means that **you** must select a strategy and marshal the facts which support your position. That is the task of an advocate.

13 Summary

A. BASIC RULES

The rights of ADD individuals stem from four sources: 1] the Constitution 2] statutes which prohibit discrimination 3] statutes which provide for programs of assistance to handicapped individuals and 4] the application of general principles of civil and criminal law. From these sources, some general principles can be abstracted.

B. CONSTITUTIONAL LAW

An ADD individual may not be deprived of "life, liberty or property, without due process of law" nor denied "the equal protection of the laws" under the 5th and 14th Amendments. These principles, as applied to persons with disabilities, have guided the development of anti-discrimination legislation and assistance.

C. DISCRIMINATION

1. *Definition*

Equal protection of the law for persons with disabilities means an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, as non-disabled persons in the most integrated setting appropriate to the person's needs. However, employment, education, housing, aids, benefits, and services, to be equally accessible, need not necessarily produce the identical result or level of achievement for handicapped and nonhandicapped persons.

Discrimination against handicapped individuals is generally prohibited under the RA and ADA. The term 'disability' means a physical or mental impairment that substantially limits one or more of the major life activities of such individual.

ADD is considered a handicap when it is both 1] severe and 2] documented. Most private organizations and public agencies are prohibited by law from discriminating against a qualified individual with a disability because of that disability.

The requirement for equal opportunity applies to the following:

■ Employment, including job applications, hiring, discharge, advancement, demotions, employee compensation, job training, and all other terms, conditions, and privileges of employment. Only those restrictions on employment which are necessary and reasonable are permitted. All public, and most private sector employment is covered. Specifically, discrimination in the following is prohibited:

- recruitment
- hiring
- job assignments
- pay
- lay off
- firing
- training
- promotions
- benefits
- leave

U.S. Equal Employment Opportunity Commission, THE AMERICANS WITH DISABILITIES ACT; YOUR RIGHTS AS AN INDIVIDUAL WITH A DISABILITY; EEOC-BK-18 (1991) at 3

■ Privacy from employer inquiries concerning whether an individual has a disability or the extent of it. The individual must decide whether to disclose his/her handicap. The EEOC offers the following advice on disability disclosure:

Q. Should I tell my employer that I have a disability?

A. If you think you will need a reasonable accommodation in order to participate in the application process or to perform essential job functions, you should inform the employer that

an accommodation will be needed. Employers are required to provide reasonable accommodation only for the physical or mental limitations of a qualified individual with a disability of which they are aware. Generally, it is the responsibility of the employee to inform the employer that an accommodation is needed.

U.S. Equal Employment Opportunity Commission, THE AMERICANS WITH DISABILITIES ACT; YOUR RIGHTS AS AN INDIVIDUAL WITH A DISABILITY; EEOC-BK-18 (1991) at 7

■ Reasonable accommodations (not resulting in undue hardship for the employer) to known physical and mental limitations. Reasonable accommodations include:

- providing or modifying equipment or devices,
- job restructuring,
- part-time or modified work schedules,
- reassignment to a vacant position,
- adjusting or modifying examinations, training materials, or policies,
- providing readers or interpreters, and
- making the workplace readily accessible to and usable by people with disabilities.

U.S. Equal Employment Opportunity Commission, THE AMERICANS WITH DISABILITIES ACT; YOUR RIGHTS AS AN INDIVIDUAL WITH A DISABILITY; EEOC-BK-18 (1991) at 3

■ Participation in and enjoyment of federally funded programs, benefits and services, including those which provide financial assistance to the maximum practical extent.

■ Access to education, and assurance that the individual will be tested and evaluated for his knowledge and not his disability.

■ Access to and enjoyment of the benefits of State and Local governmental programs and benefits. These include schools and informal "quasi-public" groups such as Parent Teacher Associations.

■ Access to public accommodations including 1] places of lodging 2] establishments serving food or drink 3] museums 4] places of entertainment 5] public assembly areas 6] sales or rental establishments 7] service establishments 8] public transportation 9] recreational facilities 10) educational institutions, including those offering professional, trade and license preparation courses 11] social services center establishments 12] places of exercise or recreation and the 13] benefits of life, health, and automobile insurance.

■ Access to education, and assurance that the individual will be tested and evaluated for his knowledge and not his disability.

■ Enjoyment of all of the above in an integrated setting.

■ Assurance that he will not be barred from any of the foregoing solely because of the class of which he is a member (e.g. his status as an ADD individual).

■ Assurance that he will not be barred from any of the foregoing without an individualized inquiry into his particular circumstances.

■ Fair housing.

■ Remedies available under Federal law as a minimum. Where State law provides greater remedies, these are available also.

2. *Limitations*

The freedom from discrimination is subject to the important qualification that some restrictions are necessary. These are:

- Employment restrictions which are job-related, necessary and reasonable are permitted.

- Employment accommodations need not be made if they result in undue hardship for the employer.

- The essential nature of Federally funded programs, benefits and services need not be changed to accommodate those with disabilities.

- The essential nature of an educational program, course of instruction, or goal of testing need not be changed to accommodate those with disabilities.

- The essential nature of State and Local governmental programs and benefits need not be changed to accommodate those with disabilities.

- The essential nature of goods, services and privileges available from public accommodations need not be changed to accommodate those with disabilities.

- Insurance carriers may write policies based on risk classifications which are supported by sound actuarial principles or classifications related to actual or reasonably anticipated experience.

D. SERVICES, SUPPORT, AND ASSISTANCE

■ ADD children are entitled to a free appropriate public education, which emphasizes special education and related services. Adaptations to the needs of an ADD child may include the following:

providing a structured learning environment

repeating and simplifying instructions about in-class and homework assignments

supplementing verbal instructions with visual instructions

using behavioral management techniques

adjusting class schedules

modifying test delivery

using tape recorders, computer- aided instruction, and other audio-visual equipment

selecting modified textbooks or workbooks; and tailoring homework assignments

consultation

special resources

reduced class size

use of one-on-one tutorials

classroom aides and note takers

involvement of a 'services coordinator' to oversee implementation of special programs and services

modification of nonacademic times such as lunchroom, recess, and physical education.

- Consideration for SSI benefits
- Possible exemption from future military services obligations

E. GENERAL LEGAL PRINCIPLES

- Family Law

Most laws are not intended to address disabilities. And of course, they apply to ADD individuals just as they do to others. However, in applying these laws, the courts have taken notice of the unique condition that is ADD. Here are the applications to date:

Parents have a legal duty to provide treatment for ADD as part of their general legal obligation to provide medical care for their children.

The cost of special tutoring, counseling, and medication is a factor which is considered in establishing the amount to be paid as child support in a divorce action.

The needs of an ADD child will be considered in custody proceedings, both those between divorcing spouses, and those initiated by a State on the basis of neglect.

- State Health and Welfare Statutes

An ADD child may be entitled to social services under State statutes.

The aggravation of ADD symptoms by workplace stress, together with other disorders resulting from the aggravated condition may be compensable under workmen's compensation statutes.

■ Criminal Law

ADD is not a mental illness which excuses criminal conduct. It is a factor which may mitigate an offense, and reduce its severity. For example, a crime of intentional misconduct might be reduced to one of reckless behavior.

The presence of ADD may justify trying a juvenile as such rather than as an adult.

ADD is a factor which may mitigate a sentence imposed for a crime, or for professional misconduct.

ADD is a factor which may be considered in deciding whether an individual has waived his constitutional rights during pre-trial interrogation, whether he has the capacity to stand trial, the capacity to testify, and whether he is a credible witness.

■ Civil Litigation

ADD behavior may be considered a symptom of injury as well as an inherited trait. The cause of ADD symptoms may be the subject of litigation in personal injury cases.

■ Education and Employment

ADD behavior may be grounds for dismissal from school or employment if the dismissal is not barred by statutes such as the ADA.

F. CONCLUSION

Law is important, but it is only one factor in filling the needs of the ADD individual. The most important factors in assisting an ADD individual (whether child or spouse) are love, support, and unrelenting advocacy. By this process the ADD person can be helped to see his own worth and to become his own advocate.

14 Resources

This is a book about law. The following books may prove helpful in assisting you, the ADD advocate, in working within the system to achieve results for you the ADD individual.

DIAGNOSIS AND MANAGEMENT

The first step is diagnosis. If you suspect ADD, you should familiarize yourself with the disorder. There are several texts which are invaluable.

Easy Reading

Brutten, Milton, PH.D. Richardson, Sylvia O., M.D. & Mangel, Charles, SOMETHING'S WRONG WITH MY CHILD, Harcourt Brace Jovanovich (1979)

Fowler, Mary C. MAYBE YOU KNOW MY KID: A PARENT'S GUIDE TO IDENTIFYING, UNDERSTANDING, AND HELPING YOUR CHILD WITH ADHD, Birch Lane Press (1990)

Ingersoll, Barbara, YOUR HYPERACTIVE CHILD, Doubleday (1988)

Wender, Paul H. THE HYPERACTIVE CHILD, ADOLESCENT AND ADULT, Oxford University Press (1987)

Textbooks

Barkley, R. ATTENTION DEFICIT HYPERACTIVITY DISORDER, A HANDBOOK FOR DIAGNOSIS AND TREATMENT, The Guilford Press (1990)

LEARNING DISABILITIES: A REPORT TO THE U.S. CONGRESS, Interagency Committee on Learning Disabilities (1987)

This text contains an excellent discussion of learning disabilities. It is authored by the United States government and is authoritative.

Weiss, Gabriel, and Hechtman, Lily Trokenberg, HYPERACTIVE CHILDREN GROWN UP, The Guilford Press (1986)

Studies

Zametkin, A., Mordahl, T.E., Gross, M.,King, A.C., Semple, W.E., Rumsey, J., Hamburger, S. & Cohen, R.M. (1990) Cerebreal glucose metabolism in adults with hyperactivity of childhood onset. *New England Journal of Medicine*, 323(2), 1361-1366

This study contains the first scientific evidence that ADD is a brain based disorder.

Strategies

Each of the texts cited above contains excellent discussions of parenting strategies. In addition, you may want to consider the following:

Feingold, Ben F. WHY YOUR CHILD IS HYPERACTIVE, Random House (1975)

Note: the author argues that ADD is caused primarily by allergic reactions to artificial colors, preservatives and additives. This view is not widely held. However, many sources recognize that allergic reactions of the type discussed may be factors in producing the difficult behavior which ADD individuals exhibit.

Greenhill, Laurence, Osman, Betty (editors)
RITALIN, THEORY AND PATIENT MANAGEMENT,
Mary Ann Leibert, Inc. (1991)

The decision to use medication is a difficult one for many parents. This is the authoritative text on Ritalin, the predominant medication used in managing ADD.

ESTABLISHING ADD

The professional evaluations of doctors, (including medical doctors pediatricians, and psychiatrists), psychologists, educators, and educational testers are the primary means of establishing ADD. These findings are essential, but the battle does not end there. Familiarity with the following texts will help you in dealing with the school system and others.

ARMY REGULATION (AR) ¶ 40-501

This document sets forth the general criteria used by the Armed Forces in accepting or rejecting applicants and draftees. It is available through the Army and is not contained in the Code of Federal Regulations.

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3rd. Ed. Rev.) (Cited as DSM-III-R); the entire Manual is invaluable because it addresses a number of disorders which either [1] often accompany ADD or [2] are confused with it. The paragraphs on ADD are a must. These are: DSM-III-R ¶ 314.01 and DSM-III-R ¶ 314.00

DEA DOCKET NO. 86-52; 53 FED. REG. 50591 (1988) This document is invaluable for two reasons. First, it contains an excellent description of ADD and second, it is authored by the United States government and is therefore authoritative.

THE MERCK MANUAL (15th Ed. 1987) is an authoritative medical text which contains an excellent discussion of ADD is under the heading: "**ATTENTION DEFICIT DISORDER (ADD)** (Hyperactivity; Hyperkinesis; Minimal Brain Dysfunction)."

THE NEW ENGLAND JOURNAL OF MEDICINE for 15 November 1990 This publication contains the first generally recognized scientific evidence which supports the proposition that ADD results from the brain's inability to process glucose at sufficient rates, in other words, that ADD is physically rather than psychologically caused.

FEDERAL POLICIES

MEMORANDUM, OFFICE OF SPECIAL PROJECTS AND REHABILITATIVE SERVICES, DEPARTMENT OF EDUCATION, 16 SEPTEMBER 1991

This memorandum sets forth DOE's view that ADD is covered by the IDEA and RA.

Matter of Cecelia A. Berard, OCR No. 04-90-1617 (17 Sep 90)

This decision of the DOE Office of Civil Rights sets forth DOE's view that ADD is covered by the IDEA and RA.

NEWSLETTERS

ADDENDUM

ADDendum is a newsletter for ADD individuals and their families. It contains invaluable anecdotal discussions of new developments, strategies and problems faced by ADD individuals. It is oriented towards ADD adults.

Address Editorial Correspondence to:

Paul Jaffe, Editor
ADDendum
Box 296
Scarborough, NY 10510

For Subscriptions ($12.00 per year for 4 issues):
ADDendum c/o
CTS.
5041-A Backlick Road
Annandale, VA 22003

For Messages (ADDendum provides an excellent source of networking opportunities):

914-278-3022

ORGANIZATIONS

ATTENTION DEFICIT DISORDER ASSOCIATION (ADDA)
Linda Philips
19262 Jamboree Boulevard
Irvine, CA 92715
1-800-487-2282

CH.A.D.D. (Children with Attention Deficit Disorder)
499 Northwest 70th Avenue
Suite 308
Plantation, Florida 33317
(305) 587-3700

Note: (This is the national organization with local chapters.)

Learning Disabilities Association
4156 Library Road
Pittsburgh, PA 15234
(412) 341-1515

Note: (This is the national organization with local chapters.)